IN THE

Supreme Court of the United States

OCTOBER TERM, 1940
No. 553

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD and WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

DAVID J. ERICKSON,
ARTHUR LeSEUER,
HARRY W. OEHLER,
Corporation Counsel, City of St. Paul.
LOUIS P. SHEAHAN,
Ass't Corporation Counsel,
City of St. Paul,
Attorneys for Petitioners,
City Hall and Court House Bldg.,
St. Paul, Minnesota.

JAMES F. LYNCH,
ANDREW R. BRATTER,
County Attorney and Assistant County Attorney respectively of the County of Ramsey, State of Minnesota,
Of Counsel,
City Hall and Court House Bldg.,
St. Paul, Minnesota.

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PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph C. Lenihan, Joseph P. Kilroy and City of Saint Paul, a municipal corporation, of the County of Ramsey, State of Minnesota, jointly and severally, pray that a Writ of Certiorari issue directing the Supreme Court of the State of Minnesota to certify to this Honorable Court, for its review and determination, the cause therein entitled, "Joseph C. Lenihan and Joseph P. Kilroy, in their own behalf as subscribers and users of the services of the Defendant and on behalf of all persons, corporations, and associations within the Metropolitan Area of St. Paul who are similarly situated and as may care to join in this action, Plaintiffs, Respondents, vs. The Tri-State Telephone and Telegraph Company, a corporation, Defendant and Appellant, and Charles Munn, Hjalmar Petersen and Frank W. Matson, individually and as members of the Railroad and Warehouse Commission, The Railroad and Warehouse Commission, of the State of Minnesota, J. A. A. Burnquist, individually and as Attorney General of the State of Minnesota, Defendants, Respondents, and City of St. Paul, Intervener, Respondent, and City of Minneapolis, Intervener, Respondent," being cause No. 32425 of the Supreme Court of the State of Minnesota, wherein the final judgment of said State Supreme Court reversing the judgment of the District Court in and for the County of Ramsey, State of Minnesota, was entered on the 21st day of August, 1940, this petition being presented and filed in this Honorable Court on the .... day of November, 1940, within three months after the entry of said final judgment.

The petitioners present herewith and file a duly certified Transcript of the Record in this cause, including the proceedings in said State Supreme Court, in this cause. The petitioners herewith furnish and deliver ten copies of the Record and the proceedings and opinion of the said State Supreme Court, in this cause so certified. (Rec. pp. 1 to 147 incl.; Sup. Rec. pp. 1 to 93 incl.; Rec. Proc. St. Sup. Ct. pp. 1 to 41 incl.)

The petitioners, Joseph C. Lenihan and Joseph P. Kilroy, plaintiffs-respondents, and the petitioner, City of Saint Paul, intervener-respondent in said cause in said State Supreme Court herein, jointly and severally, show:

SUMMARY STATEMENT OF MATTER INVOLVED.

The Railroad and Warehouse Commission of the State of Minnesota, on its own motion, by a resolution and order dated February 15, 1932, "In the Matter of Investigation for the Reduction of Telephone Rates of The Tri-State Telephone and Telegraph Company in the City of Saint Paul, Metropolitan Area," duly instituted and thereafter conducted a telephone rate proceeding pursuant to and in accordance with the provisions of Chapter 152, Minnesota Session Laws 1915. The said proceeding was culminated, save for the appeals hereinafter mentioned, by the order of the Commission made and filed in said proceeding, dated March 31, 1936, prescribing a new schedule of telephone rates respecting said metropolitan area, effective on the several billing dates next following May 31, 1936. The new schedule of rates promulgated by said order represented a reduction as respects the pre-existing telephone rates applicable to said metropolitan area, approximating 25 per cent (Record, p. 14 to 27 incl.) (Rec. Proc. St. Sup. Ct. pp. 2, 3) (Record, pp. 39, 40, Dist. Ct. Mem.)

The Tri-State Telephone and Telegraph Company, defendant-appellant, pursuant to the statute, appealed from said order to the District Court of Ramsey County, Minnesota. The said District Court, upon said appeal, entered its judgment, August 10, 1937, sustaining said order and

adjudicating the rates thereby prescribed reasonable and not confiscatory. The Company appealed from said District Court judgment to the Supreme Court of the State of Minnesota, upon which appeal said State Supreme Court filed its decision February 24, 1939, sustaining said District Court judgment. The Company procured a stay of the proceedings in the State Supreme Court until June 5, 1939, during which time it might submit a motion for re-argument, or seek a review by the United States Supreme Court. (Record, p. 1 to 33 incl. Plaintiff's complaint).

The Commission during the pendency of said stay of proceedings, on May 2, 1939, made and filed its order entitled, "In the Matter of Rates and Charges for Exchange Telephone Service by The Tri-State Telephone and Telegraph Company in the Saint Paul Metropolitan Area, and by The Northwestern Bell Telephone Company in the Minneapolis Metropolitan Area," purporting to prescribe a new and uniform schedule of telephone rates for said metropolitan areas of Saint Paul and Minneapolis, effective on billing dates on and after June 1, 1939. (Record, p. 28 to 33 incl.) (Rec. Proc. St. Sup. Ct. p. 3).

The schedule of rates which said last mentioned order of May 2, 1939 purported to prescribe represented a reduction respecting the telephone rates then in effect pertaining to the metropolitan area of Minneapolis approximating twelve and one-half per cent, and as respects the metropolitan area of Saint Paul the same represented a substantial increase, over the rates promulgated by said Commission's order of March 31, 1936, which was the subject of the aforesaid appeals, and by comparison with the rates which existed immediately prior to the effective date of said

last mentioned order, the same represented a reduction approximating only twelve and one-half per cent in lieu of the reduction afforded by the rates prescribed by the said order of March 31, 1936 approximating twenty-five per cent.

The said order, dated May 2, 1939, was entered by said Commission based only upon its recitals of an alleged agreement for its entry between the Commission and the Companies thereby sought to be regulated, and undisclosed and unrecorded information. The said order dated May 2, 1939 was entered without the filing of a complaint by either of said companies, the Attorney General or a subscriber, and without any order of the Commission inaugurating an investigation or proceeding as the basis for the same. The said order was entered without any notice or hearing, formal or otherwise, without any evidence having been adduced before the Commission, without any findings of fact based on evidence, and without any record of the Commission, in support thereof. These facts are alleged in the Complaint of the plaintiffs, admitted by the answers of the defendants, in this cause, and are apparent from the face of the order. (Record, p. 28 to 33 incl. Order; 1 to 33 incl. Plaintiffs' Complaint; 78 to 120 incl. Defendants' Answers and Replies).

The admissions by the defendants' answers, in this Cause, are substantially the same and it will suffice to here quote paragraphs 9 and 10 of the answer of The Tri-State Telephone and Telegraph Company, defendant, in this cause, to plaintiffs' complaint, which paragraphs read as follows:

> "That this defendant admits said order of May 2, 1939, was issued by the Railroad and Warehouse Commission without notice or formal hearings first afforded

plaintiffs or subscribers generally, but alleges the Attorney General had notice thereof and participated in the proceedings preliminary to and preceding said order. That these plaintiffs and the subscribers generally were represented therein, not only by the Attorney General, but by the Railroad and Warehouse Commission as a part of its statutory obligations.

This defendant admits no formal testimony was taken from sworn witnesses and hence there was no formal examination of witnesses and no transcript of evidence as such. Defendant denies that such were necessary, or that the Commission was required to have or consider anything more than said order of May 2 shows it to have had and considered." (Rec. pp. 82, 83).

The intervener-respondent, City of Saint Paul, duly intervened in said first mentioned proceeding, embracing said Order of March 31, 1936, before the Commission and actively participated, therein and in the subsequent appeals in the District and Supreme Courts as such party intervener. (Supplemental Record, Complaint in Intervention, City of Saint Paul, Answer and Replies, P. 1-77 inc.) (Rec. Proc. St. Sup. Ct. p. 18).

The City of Saint Paul, intervener-respondent, had no notice of any negotiations for the Commission's said order of May 2, 1939, which was entered as aforesaid solely upon the alleged agreement by and between the Commission, the Attorney General, and the Companies, to the exclusion of the City of Saint Paul. (Rec. pp. 28 to 33 incl. Order) (Rec. Proc. St. Sup. Ct. p. 18) (Rec. pp. 82, 83 Ans.)

This action was instituted May 22, 1939 in the District Court of Ramsey County, Minnesota, by petitioners, Joseph C. Lenihan and Joseph P. Kilroy, as the plaintiffs, as subscribers for telephone service rendered by the defendant

company in the Metropolitan area of Saint Paul on their own behalf and on behalf of all persons, corporations and associations within said metropolitan area similarly situated against the defendants, The Tri-State Telephone and Telegraph Company, the Railroad and Warehouse Commission of the State of Minnesota and the Attorney General of said State.

The petitioners, Joseph C. Lenihan and Joseph P. Kilroy as such plaintiffs in said District Court, by their complaint, amongst other things, alleged that said order of said Commission dated May 2, 1939 was void and in violation of the due process provisions of the Federal Constitution upon the grounds, amongst others asserted in said complaint, that said order was entered by said Commission without notice, hearing, evidence, or essential findings of fact, and was unsupported by any record capable of judicial review, and had for its only basis an alleged agreement, purported to be established only by the recitals of said order, between said Commission, the Attorney General of the State of Minnesota and said Companies whose rates were sought to be fixed by said assailed order. The petitioners by said Complaint, amongst other things, further alleged that said Order did not purport to find that any of the rates fixed by said Order of March 31, 1936 was unfair or unreasonable. (Record p. 1 to 33 incl.) (Rec. pp. 8, 9, 10, 11, Par. 7 Compl.)

The said petitioners, by their said complaint in said District Court, prayed the judgment of said District Court adjudicating and declaring said order of said Commission dated May 2, 1939 void and unenforceable and further permanently enjoining the Railroad and Warehouse Commis-

sion of the State of Minnesota, The Tri-State Telephone and Telegraph Company, and said Attorney General from enforcing or in any manner attempting to enforce said order. (Record p. 12-13).

The intervener-respondent, City of Saint Paul, as subscriber of The Tri-State Telephone and Telegraph Company for telephone service rendered by said defendant in said St. Paul Metropolitan Area, on its own behalf and on behalf of all other subscribers of said defendant company for telephone service rendered by said defendant company in said Metropolitan Area, duly intervened and filed and served its complaint in intervention in said action assailing said Order, dated May 2, 1939, upon substantially the same allegations as those made for its attack by said plaintiff's said complaint, in this cause, whereby it demanded the judgment of said District Court, amongst other things, adjudging and declaring the said Order of the Railroad and Warehouse Commission of the State of Minnesota, dated May 2, 1939, void and of no effect in so far as the same purports to establish, fix or limit telephone rates chargeable for telephone service rendered or to be rendered to subscribers or patrons of defendant The Tri-State Telephone and Telegraph Company within the City of Saint Paul Metropolitan Area as such area is defined by the said Order of said Commission dated March 31, 1936. (Supl. Rec. pp. 1 to 38 incl.) (Rec. Proc. St. Sup. Ct. p. 18).

The said petitioners as such plaintiffs subsequently served, filed and submitted their motion in said District Court in this cause, for judgment on the pleadings. The Intervener City of Saint Paul joined in said motion and its submission for such judgment. (Record, p. 124). (Supl. Rec. pp. 78 to 92 incl.). (Rec. p. 126).

The said motion was duly heard by said District Court on September 26, 1939, and subsequent days, and said District Court on November 14, 1939, duly made, entered and filed its order granting said motion for judgment on the pleadings (Record, p. 125 to 141 incl.) The judgment of said District Court, pursuant to said last mentioned order of said Court, was duly made, entered and filed in said action December 15, 1939, whereby said Court duly adjudged and decreed said order of said Commission, dated May 2, 1939, void and unenforceable insofar as it purports to authorize an increase in the charges for telephone service in the Saint Paul metropolitan exchange area over the charges authorized in the order of the Commission promulgated March 31, 1936, effective June 1, 1936, and that defendants and each of them be permanently enjoined from enforcing said May 2, 1939 telephone rate order in the Saint Paul metropolitan exchange area insofar as it purports to authorize charges for telephone service in excess of those authorized by said order of March 31, 1936 (Record, p. 142 to 144 incl.).

The District Court memoranda states the bases upon which said Court predicated its order for judgment and judgment in this cause, and the same disclose that said Court recognized and decided the Federal question of due process presented to said Court by the Complaint and that the decision of said Federal question was necessary to the said determination of the matter presented and was determined by said District Court, in this cause. (Rec. pp. 62, 63, 67, 68, 130, 131, 133, 134, 139).

The petitioners respectfully set forth the following excerpts from the said District Court memoranda:

"It will hardly be questioned that the Commission cannot make a comprehensive revision of an entire telephone rate schedule without determining the fair value of the rate base. An order made without holding a statutory hearing is void. Ohio Bell Tel. Co. vs. Ohio P. U. C., (1937) 301 U. S. 292, 304, 81 L. Ed. 1093. This case likewise points out emphatically the necessity that the evidence on which findings are based be known." (Record, pp. 62, 63).

"The defendants' contentions upon this point, then reduce themselves to this: 'The Commission and the Attorney General represent the public, including the subscribers; hence they are authorized without notice to the public or subscribers to waive notice on their behalf of a contemplated action to increase telephone rates; having waived such notice on their behalf no notice to the public or subscribers was necessary.' Thus, by the simple device of waiver, the Commission immunizes its orders against attack for want of notice, hearings, evidence and findings, and thereby effectually and successfully cuts off a judicial review of its actions. If the Attorney General is construed to be the representative for the subscribers with authority, on their behalf, to waive notice, hearings, evidence and findings, then he, in effect, may consent to the exercise of legislative power by an administrative body in an unconstitutional manner and in violation of express statutory requirements. The Court finds itself constrained to reject the claim that the Commission and the Attorney General, although representing the public and the subscribers, have authority to waive notice, hearings, evidence and findings. Indeed, it appears to be conclusively demonstrated in an exhaustive annotation in 79 L. Ed. at page 474 et seq. that such a delegation of legislative authority would be unconstitutional. See also Annotations in 12 A. L. R. 1435, 54 A. L. R. 1104, 92 A. L. R. 400." (Record pp. 67, 68).

The Tri-State Telephone and Telegraph Company, alone, appealed from said District Court judgment in this cause, to the Supreme Court of the State of Minnesota (Record, pp. 145 to 147 incl.). The Railroad and Warehouse Commission of the State of Minnesota, the Attorney General of the State of Minnesota and other defendants, exclusive of said appellant Company, made no effort to appeal from said District Court judgment, and none of them appeared or participated in any of the proceedings of the said State Supreme Court, in this cause (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The said appeal of The Tri-State Telephone and Telegraph Company to said State Supreme Court from said judgment of said District Court was heard and said State Supreme Court entered its opinion thereon in said Court on the 5th day of July, 1940, providing for the reversal of said District Court judgment (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The said State Supreme Court, by its order dated August 19, 1940, stayed all proceedings upon said appeal in said State Supreme Court except the entry of said final judgment (Record, Proc. St. Sup. Ct. pp. 23, 24).

The final judgment of said State Supreme Court reversing said judgment of said District Court was entered and docketed in said State Supreme Court on the 21st day of August, 1940 (Record, Proc. St. Sup. Ct. pp. 29, 30).

The said State Supreme Court, by its said opinion and final judgment, in this cause, held that the said order of said Commission, dated May 2, 1939, was valid, regardless of the fact that said order was made without notice of hearing, without evidence, and contained no findings of

fact based upon evidence (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30; p. 16, f. 3).

The opinion of the State Supreme Court, in this cause, although it makes no specific reference to the petitioners' claim of a Federal right or to the Federal question presented upon said appeal for its decision, demonstrates that the State Supreme Court did confront and decide said Federal question adversely to the claims of the petitioners and in a manner so as to deny the Federal right to due process secured to them by Section I of the Fourteenth Amendment to the Federal Constitution to insist upon the Commission's compliance in the matter of its said assailed order with the minimal requirements of such due process provisions of the Federal Constitution, which Federal right said petitioners asserted on their own behalf as such subscribers of said Company and on behalf of all others similarly situated, including the intervener, City of Saint Paul (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The Federal question thus presented for decision by the petitioners in the State Supreme Court was presented for decision to the highest court of the State having jurisdiction, upon said appeal from said District Court judgment, and the decision of said Federal question was necessary to the determination of this cause, and it was actually decided and the final judgment as rendered by the State Supreme Court, in this cause, could not have been given without deciding it (Petitioners' Complaint, Record, pp. 1 to 33 incl. and Record Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30.

The said State Supreme Court, by its opinion in this cause, said:

"In this state by statute the intrastate rates of telephone companies, of railroads and of other public utilities have been delegated to the commission. The statutes prescribe the procedure. Mason Minn. St. 1927, Sec. 5289, relating to telephone companies, requires rates to be fair and reasonable, and declares unreasonable rates unlawful. The next section provides that the rates of the companies shall be filed with the commission. Section 5291 reads: 'Whenever such rates or schedules are found to be unreasonable by the commission, upon its own motion or upon complaint, it shall prescribe reasonable rates to take the place of those found unreasonable and such new rates shall be filed in place of the rates or schedule superseded. No rate filed with the commission shall be changed by any telephone company without an order of the commission sanctioning the same. It shall be unlawful for any telephone company to collect or receive a greater or less rate or charge for any intrastate service rendered by it than the rate or charge named in the schedules on file with the commission, and no new rate shall take effect till the date named by the commission, which shall not be less than ten days after it is filed.' The section implies power in the commission to sanction and approve rates proposed by a telephone company. No procedure is prescribed where the commission of its own accord is of the opinion that the rates proposed are just and reasonable, except as certain sections relating to fixing intrastate rates for railroads are made applicable. If the change of rates is upon the commission's initiative, Sec. 4646 is applicable; but if a change of rates is sought upon complaint of users or patrons of the telephone company the proceeding must follow that indicated by Sec. 4638 to 4641, Mason Minn. St. 1927" (Rec. Proc. St. Sup. Ct. pp. 11, 12).

The said State Supreme Court, by its opinion in this cause, said:

> "But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony, and the claimed deficiency as to findings, it is nevertheless valid. The original litigation, instituted by the commission against the company in 1929, was still pending and there was almost a certainty that it would be carried to the United States Supreme Court. Parties to litigation have the right to compose and agree to settle the dispute at any stage of the proceeding. There can be no doubt from the pleadings and the commission's orders that the commission and the company did agree to settle the litigation then pending by superseding the company's rate schedule as fixed by the order of March 31, 1936, by that of the order of May 2, 1939. The attorney general conducted the litigation in behalf of the commission, and also advised it in respect to the settlement thereof, by the order of May 2, 1939. The litigation had been carried on for over nine years at great expense. The commission had heard voluminous testimony upon all phases that enter into the reasonableness of the company's rates. It knew what had transpired since such testimony was submitted in 1934. There is not the slightest hint in the record or in the argument of counsel that the agreement to end the litigation was not made in the utmost good faith. The commission (representing the public and the users of the company's services) and the company were the necessary parties to that litigation. The expenses had been enormous. More were in sight, together with uncertainty and delay, if the company's grievances were carried to the Supreme Court of the United States.
>
> Plaintiffs contend that Sec. 5298 of the code requires the commission to 'give all interested parties a chance

to furnish evidence and be heard.' But that is when the commission deems it needful to have a valuation of all the property invested in the utility, as was done prior to the order of March 31, 1936. And, of course, then Sec. 5307 applies.

We do not overlook the fact that the City of St. Paul and the City of South St. Paul—users of the company's services—were permitted to intervene in the original proceedings, and that the City of St. Paul is an intervener in this action. It does not appear that the City of St. Paul participated in the agreement which resulted in the promulgation of the order of May 2, 1939. But the commission represented one side—the public or users of the services—and the company the other side in the rate fixing controversy. Those two were the necessary parties. * * * We do not think the city's non-participation in the settlement of the litigation vitiated the order made pursuant thereto; for, as stated, its interests were represented by the commission and attorney general" (Rec. Proc. St. Sup. Ct. pp. 16, 17, 18).

The State Statute, Sec. 5308, Mason's Minn. St. 1927, provides for judicial review of a telephone rate order promulgated by said Commission, limited, however, to a review and determination upon the pleadings, evidence and exhibits introduced before the Commission and certified by it. The pertinent portion of said Sec. 5308 reads as follows:

"5308. Mode of procedure for appeals from decisions of commission—Any party to a proceeding before the commission or the attorney-general may make and perfect an appeal from such order as provided in Sections 1971-1972, Revised Laws of 1905, and acts amendatory thereof.

> Upon such appeal being so perfected it may be brought on for trial at any time by either party upon ten days' notice to the other and shall then be tried by the court without the intervention of a jury, and shall be determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it."

The construction of the said statutes, especially said Sec. 5291, by the State Supreme Court in its said opinion as manifested by the quoted portions thereof results in a denial of due process to the subscribers and patrons of said public utility. The said statutes by said State Supreme Court opinions, are construed as permitting said Commission to prescribe and promulgate telephone rates altering and increasing established rates without the initiation of any proceeding, without any notice of hearing, without any hearing, without the reception of any evidence, without any findings of fact, based upon evidence, and without any supporting record capable of judicial review, solely upon undisclosed and unrecorded information and the agreement or stipulation of the Commission and the public utility to be thus regulated (Rec. Proc. St. Sup. Ct. pp. 16 to 20 incl.).

The Courts, by said Sec. 5308 are limited in their judicial review, of said Commission's rate orders, to a determination upon the pleadings, evidence and exhibits introduced before the Commission and so certified by it. It is manifest that unless the final judgment of the State Supreme Court be reversed, that the courts may be circumvented in the exercise of their jurisdiction to judicially review rate orders promulgated by said Commission, and judicial review thereof in substance denied by a device

such as that used in the promulgation of said order of May 2, 1939, by stipulation or agreement upon a proposed schedule of rates between the said Commission and the public utility telephone company to be thus regulated, and the Commission's order thereupon, without notice, hearing, evidence or findings of fact pertinent to fair value, operating expenses or revenues founded upon evidence, since there would in such cases be an utter lack of supporting record for review and there would thus be no basis upon which the Court might determine whether the prescribed rates be reasonable or otherwise.

QUESTIONS PRESENTED.

(1) Whether said Sec. 5291, Mason's Minn. St. 1927, as construed by said State Supreme Court, in this cause, permitting the prescription and promulgation of a new and higher schedule of telephone rates solely upon the stipulation or agreement of the Railroad and Warehouse Commission of the State of Minnesota and The Tri-State Telephone and Telegraph Company, the public utility to be regulated, results in the denial to subscribers and patrons of the utility of due process or of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(2) Whether an order of the said Commission, without the initiation of a proceeding therefor by order or complaint, without notice, hearing, the reception of evidence, findings of fact based upon evidence taken and recorded, and the compilation of a record capable of judicial review, is contrary to the due process provisions of Section I of the

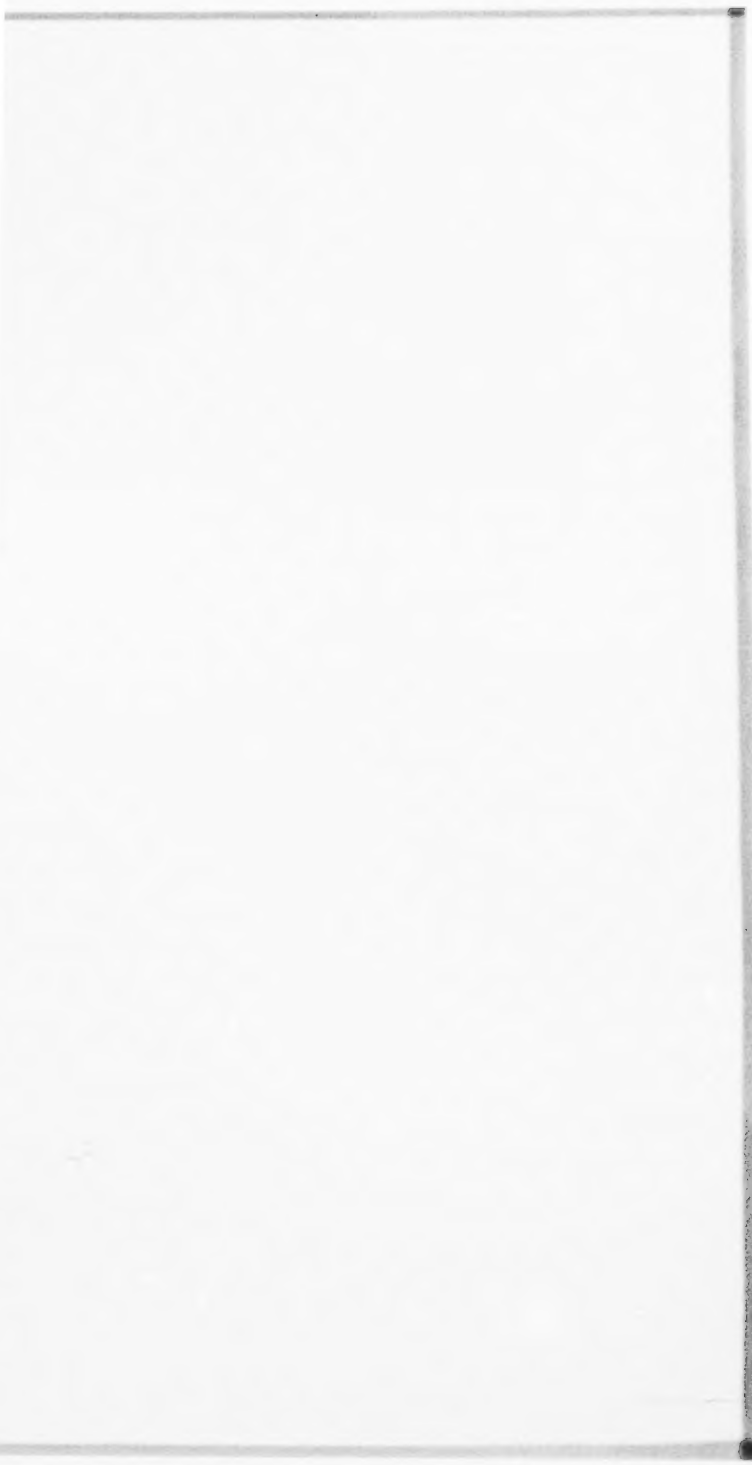
Fourteenth Amendment to the Constitution of the United States.

(3) Whether an order of said Commission prescribing and promulgating a new and higher schedule of telephone rates superseding established telephone rates, without a finding of fact based upon competent evidence taken and recorded by the Commission that such established or pre-existing rates are unreasonable, constitutes a violation of the due process provisions of Section I of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether said State Supreme Court, by its said opinion and Final Judgment holding that the order of said Commission dated May 2, 1939 is valid, denied due process of law or equal protection of the laws to the subscribers and patrons of The Tri-State Telephone and Telegraph Company guaranteed to them by Section I of the Fourteenth Amendment to the Constitution of the United States.

(5) Whether the said assailed order of May 2, 1939, as entered by the Commission, supported only by its recitals prescribing rates appreciably in excess of those prescribed by the previous litigated order of March 31, 1936, then the subject of pending appeal in said State Supreme Court after its adjudication as valid and not confiscatory by said District Court judgment and said opinion of said State Supreme Court, violated the minimal requirements of due process guaranteed to the patrons of the regulated utility and the public by Section I of the Fourteenth Amendment of the Federal Constitution.

(6) Whether the construction of said Statute, Sec. 5291, Mason's Minn. St. 1927, by said State Supreme Court, in



this cause, permitting the Commission to agree with the Company to be regulated thereby upon a schedule of rates and to make and promulgate an effective Order prescribing such stipulated schedule, without notice, hearing, evidence or findings of fact based upon evidence taken and recorded, renders said statute unconstitutional in conflict with Section I of the Fourteenth Amendment to the Federal Constitution denying subscribers and the public the substantive right to judicial review of rate orders of said Commission, secured to them by said Federal due process provisions.

STATEMENT OF JURISDICTION.

The said Supreme Court of the State of Minnesota is the highest court of the State of Minnesota in which a decision could be had in a cause of this character. The said final judgment of said Supreme Court of the State of Minnesota was entered and docketed in said court, in this cause, on the 21st day of August, 1940.

There is drawn in question, in this cause, the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States.

There is drawn in question, in this cause, the validity of a statute of the State of Minnesota, as construed by the opinion and final judgment of the said Supreme Court of the State of Minnesota in this cause, on the ground that as so construed said statute is repugnant to the Constitution of the United States.

There is drawn in question, in this cause, the validity of an order prescribing and promulgating, or purporting to prescribe and promulgate, rates and charges for tele-

phone service to subscribers of a public utility telephone company made and entered by the Railroad and Warehouse Commission of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States.

There is drawn in question, in this cause, the validity of the opinion and final judgment of the Supreme Court of the State of Minnesota, in this cause, on the ground that the same are repugnant to the Constitution of the United States.

The petitioners in this cause, in and by the complaint therein (Record pp. 8, 9, 10, 11, Par. 7 of Complaint; Dist. Ct. Memoranda pp. 40-41-61), specially set up and claimed a right, privilege or immunity under the Constitution of the United States, particularly under the due process provisions of said Federal Constitution, the Fourteenth Amendment to the same, forbidding any state to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, which Federal claim was denied by the final judgment of the said State Supreme Court in this cause as shown by this petition and the record and proceedings in said State Supreme Court filed herewith (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

The pertinent section of the Federal Constitution reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without*

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Honorable Court has jurisdiction to review this cause and the final judgment of the Supreme Court of the State of Minnesota in this cause by virtue of the provisions of Judicial Code, Sec. 237 as amended, Title 28 U. S. C. A., Sec. 344, subdivision (b), which reads as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

There are presented in this cause special and important reasons for the review of this cause on writ of certiorari hereby sought. The Supreme Court of the State of Minnesota, in this cause, has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States, or said State Supreme Court in this cause has decided a Federal question of substance in a way probably not in accord with the applicable decisions of the Supreme Court of the United States.

The petitioners in this cause, from its inception to the present, have persisted in the claim that the due process provisions of the Constitution of the United States were violated and that the subscribers and patrons of the regulated utility, The Tri-State Telephone and Telegraph Company, were denied due process of law by said Commission in the entering by said Commission of said assailed order purporting to prescribe and promulgate a new and higher schedule of telephone rates for said City of Saint Paul Metropolitan Area without the institution of a proceeding therefor, by order upon its own motion or complaint, without hearing, without evidence taken and recorded, without findings of fact upon the relevant factors necessary for consideration in the establishment and promulgation of public utility rates, and without a record capable of judicial review in relation to the reasonableness of the rates so purported to have been prescribed and promulgated, and the entering of said assailed order solely on the basis of the recitals of the same alleging an agreement on the part of said Company to desist in further attempts to litigate a previous rate proceeding then without the control of the said Commission and in the exclusive jurisdiction of the Supreme Court of the State of Minnesota,

and the alleged agreement of said Company and another company operating a separate and distinct telephone exchange in another metropolitan area within said state to accept the new schedule of rates (Rec. pp. 1 to 33 incl.) (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.)

The opinion and final judgment of said State Supreme Court are incorporated in the record filed herewith and the effect thereof in the denial of due process, the right asserted and claimed under the Federal Constitution by the petitioners in said cause, is set forth hereinabove and in the accompanying brief.

The following is an apt statement quoted from the memorandum of the said District Court in this cause (Record p. 136-137):

> "As had already been stated, in the absence of hearings, evidence and findings there can be no effective review by appeal. If this action does not lie then the only recourse left to the public for redress from what it believes to be an unjust rate is the political arena. But political arguments are a poor substitute for sworn witnesses, books of account, inventories, expert data, cross-examination, analyses and the atmosphere surrounding a quasijudicial or a judicial hearing when it comes to so intricate and multiplex a subject as rate regulation. It seems a reasonable conclusion that the provisions for hearings, recorded evidence and findings are for the protection of the public as well as the utility.
>
> "Nor does it follow that the alternative to a 'formal, expensive and long-drawn-out investigation or litigation' is a cloistered conference resulting in a multiple rate order, unheralded until after its promulgation, based upon general conclusions drawn from unrecorded information, and unsustained by any statement of facts found. And still less does it follow that

> having conducted a formal, expensive and long-drawn-out investigation over a period of four years, followed by three years of litigation, at an alleged cost to the taxpayers of $400,000.00 (Answer of Commissioners and Attorney General, p. 8), and resulting in judgments favorable to the public, the Commission is justified in bartering away a substantial portion of the benefits won, without notice to the public, without public hearings, on unrecorded information, and without findings upon essential matters."

The said quoted statement taken from said District Court memorandum, was directed to said assailed order of said Commission dated May 2, 1939, and the circumstances which attended the filing of said order by said Commission. The litigation therein mentioned as resulting in judgments favorable to the public pertained to the said Commission's order of March 31, 1936 and the said appeals therefrom by the Company to the said District Court and said State Supreme Court.

The said State Supreme Court in this cause has construed said Sec. 5291, Mason's Minn. St. 1927, so as to permit the Commission, by the device constructed for the enactment of its said order of May 2, 1939, to immunize said order from judicial review as to its reasonableness both as regards the patrons of the Company and the public, in violation of the Fourteenth Amendment to the Constitution of the United States and in denial of due process to subscribers and patrons of the Company for the service sought to be regulated and for which rates were sought to have been prescribed by said assailed order. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

Chicago, M. & St. P. R. Co. v. State of Minn., 33 L. Ed. 970, 981, 134 U. S. 418;

The assailed order admittedly made and entered without notice, hearing, evidence, or findings upon evidence, or a record capable of judicial review, manifestly did not conform to the minimal requirements of due process guaranteed by Sec. I of the Fourteenth Amendment to the Federal Constitution, to all interested parties in a rate proceeding of such character and constituted a denial of such due process to the subscribers and patrons of the public utility whose rates were thereby sought to be fixed and regulated. Citing (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.),

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Ohio Bell Teleph. Co. v. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302, 303, 304, 305;

Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434; 227 U. S. 88, 91;

St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295.

The writ of certiorari will lie to review a cause wherein the final judgment of a State Supreme Court adjudicates as valid an order of a state rate fixing commission made without evidence or based upon evidence insufficient for its support, or arbitrary in its nature and not conforming to the minimal procedural requirements of such due process. See,

Chicago, M. & St. P. R. Co. v. Public Utilities Com. of the State of Idaho, 71 L. Ed. 1085.

The petitioners specially set up and claimed that the assailed order did not conform to the due process provisions of the Federal Constitution and specifically enumerated its deficiencies in that regard by their complaint in paragraph seven thereof hereinabove cited (Record, pp. 8, 9, 10, 11). The decision upon this Federal question was necessary to the determination of this cause, and the opinion and final judgment of said State Supreme Court rejected said claim but avoided specific reference to it. This had the same effect as if said claim of Federal right had been expressly denied. (Rec. pp. 1 to 33 incl.) (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, 50 L. Ed. 596, 604.

See also,

Zucht v. King et al., 67 L. Ed. 194.

wherein the Court said:

"A question of unconstitutional exercise of authority under a constitutional law can be reviewed only by certiorari, unless associated with other questions sufficient to support writ of error."

REASONS FOR ALLOWANCE OF WRIT.

The petitioners, under this subdivision, refer to the previous subdivisions of this petition and the numerous statements therein set forth as reasons for the issuance of the Writ of Certiorari hereby sought.

The petitioners submit that there was presented, in this cause, a Federal question, specially set up in the said complaint by the claim that said assailed order violated the

due process provisions of the Constitution of the United States; that said Federal question was decided by the opinion and final judgment of the Supreme Court of the State of Minnesota, in this cause, in a way not in accord with the applicable decisions of this Court, and that the Federal question thus presented and determined was substantial in character. (Rec. pp. 1 to 33 incl.).

The said State Supreme Court in this cause, by its opinion and final judgment determined, that said assailed order was consistent with the due process provisions of the Federal Constitution and expressly construed said state statute, said Sec. 5291, so as to permit the making and filing of said assailed order, purporting to prescribe and promulgate telephone rates and charges to subscribers of said public utility, without notice, hearing, evidence, findings based on evidence, or a record of its proceedings capable of judicial review upon the question of the reasonableness of the rates and charges thereby purported to have been prescribed and promulgated. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

The said State Supreme Court, by said opinion and final judgment, held that said assailed order was sustained by its bare recitals of alleged agreement between the said Commission, the Companies thereby regulated or purported to have been regulated in the matter of rates and charges, and the promise of The Tri-State Telephone and Telegraph Company to refrain from further attempt to litigate the previous rate order of said Commission dated March 31, 1936, which had been, upon the appeals of said Company, sustained as reasonable and not confiscatory by the judgment of the said District Court and the opinion or

decision of said State Supreme Court, the latter dated February 24, 1939. (Rec. Proc. St. Sup. Co. pp. 1 to 20 incl.).

The previous decisions of this Honorable Court have consistently held that state rate fixing commissions, conditional to affording due process required by the Fourteenth Amendment of the Federal Constitution, must, in the prescription and promulgation of public utility rates, give notice of hearing, act upon evidence relevant to pertinent factors, make findings of fact upon competent evidence respecting fair value of the rate base, operating expenses and revenues of the utility to be thus regulated, and other pertinent factors, and that an order fixing such rates must be based upon competent evidence adequate to sustain the Commission's findings and a record capable of judicial review upon the question of the reasonableness of the rates prescribed.

The assailed order is utterly bereft of any of the minimal requirements of a valid rate order, and upon its face and by its recitals, demonstrates its denial of due process to subscribers and patrons of the utilities with which it purports to deal in the matter of the prescription of rates and charges.

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Ohio Bell Teleph. Co. v. Public Utilities Co., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302, 303, 304, 305;

Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433; 277 U. S. 88, 91;

St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295.

There can be no compromise in such matters upon the basis of convenience, expediency or a natural desire to be rid of harassing delay when the minimal requirements must be neglected or ignored.

Ohio Bell Teleph. Co. v. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302, 303, 304, 305.

The State Supreme Court opinion and final judgment, in this cause, are at material variance with the decisions of this Honorable Court. The said State Supreme Court opinion and final judgment, in this cause, and said assailed order, palpably transgress the inhibitions of the due process provisions of the Federal Constitution and manifestly deny to the public and the patrons and subscribers of The Tri-State Telephone and Telegraph Company due process of law secured to them by such due process provisions, and deprive them of their Federal constitutional right to demand compliance by said Commission with the aforesaid minimal requirements of such due process provisions as a condition precedent to its order prescribing and promulgating telephone rates. This cause presents a situation by the said State Supreme Court opinion and final judgment, manifestly requiring correction and revision by this Honorable Court upon its review and determination of this cause and the questions thereby presented. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

These points are further elaborated in the petitioners' supporting Assignment of Errors and Brief.

The petitioners by their said complaint alleged, as one of the grounds for the injunctive relief thereby sought that the petitioners, as such subscribers, and all others similarly situated had no plain, speedy or other adequate

remedy at law, such complaint incorporating said order of March 31, 1936 as Exhibit "A" and said order of May 2, 1939, as Exhibit "B", by copies annexed thereto, demonstrates the verity of said allegation and such was then and since has been the case. (Rec. pp. 1 to 33 incl. Complaint; pp. 14 to 27 incl. Order; pp. 28 to 33 incl. Order pp. 11 and 12)

WHEREFORE, in view of the premises, your petitioners, jointly and severally, pray that this Honorable Court grant and issue its Writ of Certiorari directed to the Supreme Court of the State of Minnesota requiring that the complete Record in this cause, in said Court, and its final judgment thereon, be certified to this Honorable Court, and that this Honorable Court will thereupon proceed to correct the errors herein cited and complained of and reverse the judgment of said Supreme Court of the State of Minnesota, in this cause; and as an alternative only in the event this Court shall deny such prayers for the issuance of a Writ of Certiorari, that this Court allow an appeal from said Final Judgment of said State Supreme Court unto your petitioners and accept this petition and the accompanying brief and certified transcript of the Record filed herewith as the petition of your petitioners for the allowance of such appeal for which your petitioners, jointly and severally, pray in the event of such denial, and your petitioners further pray that this Honorable Court grant unto your petitioners such other and further relief as the nature of the case may require and as may seem proper to this Honorable Court in the premises.

JOSEPH C. LENIHAN, JOSEPH P. KILROY and CITY OF SAINT PAUL, a municipal corporation,
Petitioners.

DAVID J. ERICKSON

ARTHUR LeSUEUR

HARRY W. OEHLER
Corporation Counsel, City of
Saint Paul.

LOUIS P. SHEAHAN
Ass't Corporation Counsel, City
of Saint Paul.
Their Attorneys.
City Hall and Court House
Bldg.,
St. Paul, Minnesota.

JAMES F. LYNCH

ANDREW R. BRATTER

County Attorney and Assistant
County Attorney, respectively,
of the County of Ramsey, State
of Minnesota.

Of Counsel.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

STATE OF MINNESOTA,
COUNTY OF RAMSEY—ss.

David J. Erickson, being duly sworn upon his oath deposes and says that he is one of the counsel for the petitioners, Joseph C. Lenihan, Joseph P. Kilroy and City of Saint Paul, a municipal corporation; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied the transcript of record and proceedings in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record and proceedings, and that he knows of the above proceedings had, and that he verily believes the facts stated in said petition are true.

David J. Erickson

Subscribed and sworn to before me this 12th day of October, 1940.

M. E. UTZ,
Notary Public within and for Ramsey County, State of Minnesota.
My Commission Expires Feb. 7, 1942.

Notarial Seal,
Ramsey County, Minnesota.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

JOSEPH C. LENIHAN AND JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of The Tri-State Telephone and Telegraph Company, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES MUNN, HJALMAR PETERSEN AND FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, The Railroad and Warehouse Commission of the State of Minnesota, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITIONERS' ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Supreme Court of the State of Minnesota erred in this cause in its said opinion and final judgment in the following particulars:

(1) The said State Supreme Court erred in its construction of Sec. 5291, Mason's Minn. St. of 1937, to the effect that the same permitted the Railroad and Warehouse Commission of the State of Minnesota to prescribe telephone rates by its said order of May 2, 1939, without notice, hearing, evidence, findings of fact upon evidence or a supporting record capable of judicial review. (Rec. Proc. St. Sup. Ct. pp. 1-20 incl.; pp. 11 to 16 incl.).

(2) The said State Supreme Court erred in holding that said Commission might lawfully, by its order based solely upon the agreement between said Commission, the Attorney General of said state and the Companies to be regulated, evidenced only by its recitals, prescribe and promulgate rates and charges for telephone service (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(3) The said State Supreme Court erred in holding that said Commission might lawfully enter its order without notice, hearing, evidence, or findings based on evidence modifying and increasing established telephone rates. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp 16 to 23).

(4) The said State Supreme Court erred in holding that said Commission was empowered to alter and increase the rates prescribed by its previous order, then the subject of a pending appeal in said State Supreme Court after the decision upon such appeal affirming the judgment of the District Court adjudicating the rates prescribed by said previous order reasonable and not confiscatory, without the institution of any proceeding therefor, without notice, hearing, evidence or findings based on evidence or

any purported finding that such pre-existing rates were unreasonable (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(5) The said State Supreme Court erred in holding that said Commission was empowered to wrest the previous litigated case involving its order of March 31, 1936, from the jurisdiction of the State Supreme Court and to make and enter its said assailed order of May 2, 1939, without any supporting proceeding, superseding and increasing the rate schedule for the said City of Saint Paul Metropolitan Area prescribed by said litigated order of March 31, 1936. (Rec. Proc. St. Sup. Ct. pp 1 to 20 incl.; pp. 16 to 20 incl.).

(6) The said State Supreme Court erred in not affirming the judgment of the District Court of Ramsey County, Minnesota, dated December 15, 1939, in this cause, adjudicating said assailed order as void and unenforceable insofar as the same purported to prescribe telephone rates in excess of those prescribed for said last mentioned metropolitan area by the Commission's litigated order of March 31, 1936 (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(7) The said State Supreme Court erred in entering and docketing its judgment reversing said District Court judgment (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(8) The said State Supreme Court erred in holding that said Commission was empowered, solely by virtue of a composition made to the exclusion of the City of Saint Paul, a party intervener in the litigation involving its previous order of March 31, 1936, to supersede and increase the rates prescribed by its said order of March 31, 1936.

(Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(9) The said State Supreme Court erred in holding that said Commission was, by virtue of said Sec. 5291, empowered to dispense with the statutory procedural standards for notice, hearing, the reception of evidence, findings of fact and the compilation of a record capable of judicial review and to enter its order prescribing increased rates upon the proposal therefor by the utility to be thereby regulated (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 12, 13).

(10) The said State Supreme Court erred in not holding that the assailed order was invalid and ineffective as involving the usurpation and exercise by the Commission of pure legislative power, in disregard of the minimal requirements of due process demanded by Section I of the Fourteenth Amendment to the Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(11) The said State Supreme Court erred in not holding that said Commission was a mere administrative body exercising quasi-judicial powers, circumscribed therein by Federal Constitutional requirements for notice, hearing, evidence and findings of fact based on evidence, conditional to the making of a valid order fixing rates (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl. pp. 13 to 16 incl.).

(12) The said State Supreme Court erred in holding that said assailed order of May 2, 1939 conformed to the due process provisions of the Fourteenth Amendment to the Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1-20 incl. pp. 29, 30).

(13) The said State Supreme Court erred in not holding that said order of said Commission, dated May 2,

1939, violated the due process requirements of the Fourteenth Amendment to the Federal Constitution and infringed upon the rights of the subscribers and patrons of The Tri-State Telephone and Telegraph Company, and the public, guaranteed and secured to them by Section I of the said Federal Constitutional Amendment (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(14) The said State Supreme Court erred in not holding said Sec. 5291, as the same was construed by the State Supreme Court, in this cause, unconstitutional and in violation of the Fourteenth Amendment to the Federal Constitution (Rec. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16-20 incl.).

(15) The said State Supreme Court erred in holding that in the enactment of said assailed order, said Commission might substitute for the minimal requirements of a valid rate order, a compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay, and to thereby prescribe a uniform schedule of rates for two separate and distinct telephone exchange units operated and owned in separate metropolitan areas by separate companies, without any rate investigation pertinent to either (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(16) The said State Supreme Court erred in not holding that said assailed order was arbitrary, baseless and in violation of the said due process provisions of the Fourteenth Amendment to the Federal Constitution and a denial of the rights of subscribers and patrons of the companies thereby sought to be regulated (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(17) The said State Supreme Court erred in holding that said assailed order was not vitiated by reason of absence of notice to the petitioner, City of Saint Paul, and its non-participation in the alleged agreement which the order recited as its sole base (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; p. 18).

(18) The said State Supreme Court erred in holding that the said Commission was empowered, as the representative of the public and the subscribers and patrons of the companies purported to have been affected by said assailed order, to agree with such companies for the prescription of the rates thereby purported to be promulgated, without compliance with the minimal requirements of due process demanded in such cases by the Fourteenth Amendment to the Federal Constitution as the same has been construed and applied by the decisions of this Honorable Court (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.).

(19) The said State Supreme Court erred in not holding said assailed order unconstitutional and in violation of the minimal requirements of the Fourteenth Amendment to the Federal Constitution, since the same was admittedly entered without the institution of any rate proceeding by the Commission, without any notice, hearing, evidence or findings of fact based on evidence, or record capable of judicial review respecting the reasonableness of said order or the rates thereby purported to have been prescribed and promulgated.

BRIEF.

In Support of Petition for Writ of Certiorari.

The Applicable State Statutes Delegating the rate making power, here in question, to the Railroad and Warehouse Commission of the State of Minnesota are contained in Chapter 152, Minnesota Sessions Laws, 1915, as amended (Mason's Minnesota Statutes, 1927, Chapter 28 A-1, Sections 5286-5319 inclusive and amendments).

Section 5289 of said Statutes provides:

> "It shall be the duty of every telephone company to furnish reasonably adequate service and facilities for the accommodation of the public, and its rates, tolls and charges shall be fair and reasonable for the intrastate use thereof. All unreasonable rates, tolls and charges are hereby declared to be unlawful."

Section 5291 of said Statutes provides:

> "Whenever such rates or schedules are found to be unreasonable by the commission, upon its own motion or upon complaint, it shall prescribe reasonable rates to take the place of those found unreasonable and such new rates shall be filed in place of the rates or schedule superseded. No rates filed with the commission shall be changed by any telephone company without an order of the commissioner sanctioning the same. It shall be unlawful for any telephone company to collect or receive a greater or less rate or charge for any intrastate service rendered by it than the rate or charge named in the schedules on file with the commission, and no new rate shall take effect till the date named by the commission, which shall not be less than ten days after it is filed."

Section 5298 of said Statutes as pertinent here provides:

> "The commission shall, whenever it deems the same necessary, determine the value of all the property of any telephone company devoted to the public use, and in so doing it shall, after notice to the telephone company, hold such public hearing as will give all interested parties a chance to furnish evidence and be heard. For the purpose of this act the commission is authorized to appoint engineers, examiners, experts, clerks, accountants and other assistants as it may deem necessary at such rates of compensation as it may prescribe."

Section 5304 of said Statutes, as construed by said State Supreme Court *In re*: *Northwestern Bell Telephone Co.*, 164 Minn. 279, 283, provides that, in each such case, telephone exchange units shall be dealt with separately.

Section 5307 of said Statutes, respecting rate proceedings conducted by the Commission, provides as follows:

> "A full and complete record shall be kept by the commission of all proceedings had before it upon any formal investigation or hearing and all testimony received or offered shall be taken down by the stenographer appointed by the commission and a transcribed copy of such record shall be furnished to any party to such investigation upon the payment of the expense of furnishing said transcribed copy.
>
> "Whenever an appeal is taken from any order of the commission under the provisions of this act, the commission shall forthwith cause a certified transcript of all proceedings had, of all pleadings and files, and all testimony taken or offered before it upon which such order was based, showing particularly what, if any evidence, offered was excluded, to be made and filed with the clerk of the district court where such appeal is pending."

Section 5308 of said Statutes pertinent to such rate proceedings, provides:

> "Any party to a proceeding before the commission or the attorney-general may make and perfect an appeal from such order as provided in Sections 1971-1972, Revised Laws of 1905, and acts amendatory thereof." "Upon such appeal being so perfected it may be brought on for trial at any time by either party upon ten days' notice to the other and shall then be tried by the court without the intervention of a jury, and shall be determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it."

The State Commission, in making the assailed order, without a supporting proceeding, in disregard of the minimal requirements of due process, violated the Federal Constitutional Inhibitions of the Fourteenth Amendment, to the prejudice of the Public and Telephone users.

The assailed order purports to prescribe uniform rates applicable to the City of Saint Paul Metropolitan Area, wherein The Tri-State Telephone and Telegraph Company is the operating utility, and the City of Minneapolis Metropolitan Area, wherein the Northwestern Bell Telephone Company is the operating utility, without any rate proceeding relative to either (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 5 to 10 incl.).

The assailed order admittedly was made without the institution by said Commission of any proceeding therefor, without notice of hearing, without the conduct of a hearing, without the reception of any evidence, without any findings of fact based upon evidence or a record for its

support capable of judicial review and a determination thereon relative to the reasonableness of the same or the rates thereby prescribed (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; 16 to 20 incl.) (Rec. pp. 82, 83, 91, 111).

The assailed order owes its sole support to its recitals to the effect that it represented a compromise effected by and between the Commission, the Attorney General of the State and said Companies, the Companies agreeing to accept the rate schedules incorporated in said order, and The Tri-State Telephone and Telegraph Company further agreeing to desist from further attempts to litigate the Commission's previous order of March 31, 1936, made after protracted litigation pertaining to the City of Saint Paul Metropolitan Area, adjudicated upon appeal as reasonable and not confiscatory by the judgment of the District Court of Ramsey County, Minnesota, which judgment, upon appeal to said State Supreme Court, was affirmed by the decision of the Court dated February 24, 1939, (State vs. Tri-State Tel. & Tel. Co., 284 N. W. 294) such appeals having been taken by The Tri-State Telephone and Telegraph Company, and the latter appeal then pending in the said State Supreme Court upon a stay of proceedings whereby the entry of final judgment pursuant to said decisions was suspended to permit the appellant to seek a re-argument or relief by way of review in the Supreme Court of the United States (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The previous proceeding embracing the order of the Commission dated March 31, 1936, was instituted by the Commission upon its own initiative and its order dated February 15, 1932, and related only to the prescription of telephone rates chargeable by The Tri-State Telephone and

Telegraph Company in the City of Saint Paul Metropolitan Area. This proceeding, by the appeal of the Company from the Commission's order to the District Court of Ramsey County, Minnesota, was effectively transferred from the jurisdiction of the Commission to the courts where the same was pending in the State Supreme Court when the assailed order dated May 2, 1939 was so made and entered by the Commission (Rec. Proc. St. Sup. Ct. pp. 1 to 4 incl.).

The assailed order so made, purported to prescribe a schedule of rates chargeable by The Tri-State Telephone and Telegraph Company, applicable to the City of Saint Paul Metropolitan Area, appreciably in excess of those prescribed by the litigated order of the Commission, that dated March 31, 1936, made in a separate and distinct proceeding which was the subject of the aforesaid appeals respectively to the State District and Supreme Courts. (Rec. pp. 39, 40, Dist. Ct. Mem.)

The assailed order, emphasizes its lack of respect for the minimal requirements of the due process provisions of the Fourteenth Amendment to the Federal Constitution as the same have been construed and applied by this Honorable Court respecting the necessity for notice, hearings and orders based upon evidence taken and recorded so as to permit judicial review of the rates prescribed, since it contains no finding or purported finding that any of the rates fixed by the previous litigated order was unreasonable or unjust (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.).

The Statute, Section 5289 hereinabove quoted, secures to the public and patrons and users of telephone service rendered by a public utility governed by said act, the right to reasonably adequate service to be furnished as a mat-

ter of duty thereby imposed upon the Company, at fair and reasonable rates.

The order of the Commission prescribing a schedule of telephone rates applicable to any metropolitan area must be founded, upon competent evidence and findings of fact pertinent to the factors necessarily employed in the establishment of rates and a record capable of judicial review respecting the reasonableness of the rates prescribed, both as regards the Company and its patrons and the public.

Chicago, M. & St. P. R. Co. v. State of Minn., 33 L. Ed. 970, 981; 134 U. S. 418, 458.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Western Buse Tel. Co. v. N. W. Bell Tel. Co., 188 Minn. 524, 539,

"Law contemplates much mutual understanding and appreciation between a telephone company and its patrons. The company's business is given a monopolistic character and is almost assured a reasonable rate upon the value of its property, a protection not enjoyed by private business. The income is not large or speculative, but conservative and quite certain. On the other hand, the patron is protected from exorbitant rates. * * * The patrons are entitled to demand service, and the company must comply. It is entitled to just compensation; no more."

The assailed order does not purport to be based upon any finding of fair value of the property of either Company used or useful in the rendition of the service for which rates are thereby prescribed, or any finding pertaining to operating expenses or revenues derived or to be derived by either Company, or any finding based upon any evidence, though reference is made therein to resort by the Commission to undisclosed and unrecorded information and said order is expressly, by its recitals, limited for its support to impertinent or irrelevant considerations and matters; convenience and avoidance of delay and expense attendant upon requisite rate investigations, the willingness of the Companies to accept the rates prescribed without protest, and the termination of attempts on the part of one of the Companies to further litigate respecting a separate and distinct proceeding (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.).

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393,

"As the District Court did not deal with the issue of confiscation and the evidence is not before us, we are concerned only with the question of procedural due process, that is, whether the commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution. We examine this question in the light of well settled principles governing the proceedings of rate making commissions. *The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.* Ohio Bell Teleph. Co. v. Public Utilities Com., 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of

fair trial, and the commission must act upon evidence and not arbitrarily. Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 51, 73, 80 L. Ed. 1033, 1041, 1052, 56 S. Ct. 720; Morgan v. United States, 298 U. S. 468, 480, 481, 80 L. Ed. 1288, 1294, 1295, 56 S. Ct. 906; Ohio Bell Teleph. Co. v. Public Utilities Com., 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724, supra."

The due process provisions of the Federal Constitution applicable to such proceedings require that a state Commission, in the prescription of public utility rates, must act upon competent evidence taken and recorded in the proceeding from which its order emanates. The commission may not base any order prescribing rates upon information not incorporated in the form of competent evidence in its record.

Ohio Bell Teleph. v. Public Utilities Com., 81 L. Ed. 1093, 1100, 1101; 301 U. S. 292, 302, 303,

"There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial

review of the decision to challenge the deductions made from them. The opportunity is excluded here. The commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to the journals and tax lists, as if a Judge were to tell us, 'I looked into the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

The Minnesota Statute, Section 5308, above quoted, limits a judicial review of an order of the Commission prescribing rates to a review and a determination upon the pleadings, evidence and exhibits introduced before the Commission and so certified by it.

The assailed order made as aforesaid, without any evidence for its support, is incapable of judicial review respecting the rates thereby purported to be prescribed. This results in a denial of due process to the public and patrons and users of telephone service rendered by the regulated utility company, since neither the order nor any supporting record of the Commission affords any basis upon which the Court might predicate a determination upon review relative to the reasonableness of said Order or such rates. (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.).

Ohio Bell Teleph. Co. v. Public Utilities Co., supra, 81 L. Ed. page 1101, 301 U. S. pages 303, 304,

"In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality

> if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: How was it possible for the appellate court to review the law and the facts and intelligently to say that the findings of the Commission were supported by the evidence when the evidence that it approved was unknowable. * * * What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.' (Citing cases)."

The assailed order makes veiled references to certain investigations conducted pertinent to the situation of the Companies, without any disclosures as to how the same were conducted or what the same divulged. The order emanated from a cloistered or secret conference of the Commission, the Companies affected, and the Attorney General, to the exclusion of the public and the City of Saint Paul, the latter being a party intervener in the proceeding which embraced the Commission's order of March 31, 1936. The order could find no validity in anything that was the subject of its recitals since the same had no evidence for its support (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.). (Rec. 136, 137, Dist. Ct. Mem.).

Ohio Bell Teleph. Co. v. Public Utilities Com., supra, 81 L. Ed. pages 1101, 1102; 301 U. S. pages 304, 305,

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from the courts when it has been reached with due

submission to constitutional restraints. (Citing cases.) Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U. S. 468, 480, 481, 80 L. Ed. 1288, 1294, 1295, 56 S. Ct. 906; Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185, supra. The right to such hearing is one of 'the rudiments of fair play' (Chicago M. & St. P. R. Co. v. Polt, 232 U. S. 165, 168, 58 L. Ed. 554, 555, 34 S. Ct. 301) *assured to every litigant by the Fourteenth Amendment as a minimal requirement.* West Ohio Gas Co. v. Public Utilities Com. (No. 1), (No. 2), 294 U. S. 63, 79, 79 L. Ed. 761, 773, 55 S. Ct. 316, 324, supra; Brinkerhof-Ferris Trust & Sav. Co. v. Hill, 281 U. S. 673, 682, 74 L. Ed. 1107, 1114, 50 S. Ct. 451. See f. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

The State Supreme Court, by its decision and final judgment, denied Federal right specialty set up by the Petitioners-Plaintiffs as subscribers and users of telephone service rendered by the Tri-State Telephone and Telegraph Company and on behalf of others similarly situated, secured to them by Section I of the Fourteenth Amendment to the Federal Constitution.

The petitioners, in the State Courts, as subscribers and users of telephone service rendered by The Tri-State Telephone and Telegraph Company in the City of Saint Paul Metropolitan Area, on their own behalf and on behalf of others similarly situated, by their complaint served and filed in the District Court of Ramsey County, Minnesota, in this cause, specially set up their right to due process in the matter of the assailed order and to insist upon compliance by the Commission to the minimal requirements of due process respecting the order of the Commission fixing rates for telephone service applicable to said area. The complaint specifically, and in detail, pointed out the fatal deficiencies in the proceedings which attended the making of the assailed order, hereinabove enumerated, and alleged that said assailed order did not conform with the due process provisions of the Federal Constitution (Rec. pp. 1 to 33 incl. Complaint.) (Rec. pp. 8, 9, 10, 11).

The pleadings of the parties to this cause affirmatively established the fact that the assailed order was unattended by any notice, hearing, evidence or findings upon evidence. These fatal deficiencies are apparent from the face of the assailed order and its recitals. The Tri-State Telephone and Telegraph Company, in paragraph ten of its answer in the District Court, in this cause, admitted that said assailed

order was unsupported by any evidence and denied that any such support was necessary to its validity, and further denied that the Commission was required to have or consider anything more than its said assailed order of May 2, 1939, shows it to have had and considered. The following is said paragraph ten of said Answer: (Rec. pp. 28 to 33 inc. Order; 1 to 33 incl. Complaint; 78 to 120 Ans. & Repl.)

> "This defendant admits no formal testimony was taken from sworn witnesses and hence there was no formal examination of witnesses and no transcript of evidence as such. Defendant denies that such were necessary, or that the Commission was required to have or consider anything more than said order of May 2 shows it to have had and considered." (Record pp. 82 and 83.)

The said District Court in this cause granted the petitioners-plaintiffs' motion, in which the petitioner-intervener, City of Saint Paul joined, for judgment on the pleadings and, pursuant thereto, the judgment of said District Court was entered and docketed December 15, 1939, adjudging and declaring said assailed order invalid and unenforceable, insofar as the same purports to prescribe rates applicable to said Metropolitan Area of the City of Saint Paul in excess of the rates prescribed therefor by the said prior order of the Commission dated March 31, 1936. (Rec. pp. 125 to 144 incl.)

The Tri-State Telephone and Telegraph Company, defendant-appellant, in this cause, in the State Supreme Court, alone appealed from said District Court judgment. The Railroad and Warehouse Commission of the State of Minnesota and the Attorney General of said State, the other defendants, in this cause, in said District Court, took no appeal from said District Court judgment and, to all

intents and purposes, acquiesced therein. (Rec. Proc. St. Supt. Ct. 1-20 incl. Rec. 145, 146).

The Federal question thus presented for decision by the petitioners, plaintiffs-respondents, in this cause, in the State Supreme Court, was presented for decision to the highest court of the State having jurisdiction, upon the said appeal from said District Court judgment, and the decision of said Federal question was necessary to the determination of this cause, and it was actually decided, and the final judgment as rendered by said State Supreme Court, in this cause, could not have been given without deciding it. (Rec. Proc. St. Sup. Ct. 1-20 incl. pp. 29, 30).

The opinion of the State Supreme Court, in this cause, though it makes no specific reference to the petitioners' claim of a Federal right or to the Federal question presented upon said appeal for its decision, demonstrates that the State Supreme Court did confront and decide said Federal question adversely to the claims of the petitioners and in a manner so as to deny the Federal right which the petitioners asserted on their own behalf as such subscribers of said Company and on behalf of all others similarly situated, including the intervener City of Saint Paul. This fact is apparent from the following quoted portion thereof:

> "The theory of plaintiffs and the trial court, as set forth in the learned memorandum of 28 pages accompanying the order over-ruling defendants' demurrer to the complaint and the order for judgment on the pleadings, is that the order of May 2, 1939, is void because there was no notice of hearing, no testimony taken, and no findings of fact contained therein sufficient in law to sustain it. The company's view of Sec. 5291 is that it has the right at any time to propose a new schedule of rates in place of the one in operation pro-

vided it is approved or sanctioned by the commission. * * * The commission in determining whether the proposed new schedule of rates is just and reasonable need not necessarily have a valuation of the company's property and a tedious and expensive litigation. It may already have knowledge of the situation. No statute is pointed to which prescribes that there must be notice given of hearings and testimony taken if the commission has all the necessary information for determining whether the rates proposed to supersede those in force are just and reasonable. * * * It should be noted that the commission in sanctioning proposed changes of rate schedules is performing a legislative function delegated to it. In so doing it represents the public—the patrons of the public utility. The patrons or users of the company's services have no vested rights to any fixed rates." (Record Proc. St. Sup. Ct. pp. 12, 13.)

The said State Supreme Court, by its said decision, stated further:

"*But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony, and the claimed deficiency as to findings, it is nevertheless valid.* The original litigation, instituted by the commission against the company in 1929, was still pending and there was almost a certainty that it would be carried to the United States Supreme Court. Parties to litigation have the right to compose and agree to settle the dispute at any stage of the proceeding. There can be no doubt from the pleadings and the commission's orders that the commission and the company did agree to settle the litigation then pending by superseding the company's rate schedule as fixed by the order of March 31, 1936, by that of the order of May

2, 1939. The attorney general conducted the litigation in behalf of the commission, and also advised it in respect to the settlement thereof, by the order of May 2, 1939. The litigation had been carried on for over nine years at great expense. The commission had heard voluminous testimony upon all phases that enter into the reasonableness of the company's rates. It knew what had transpired since such testimony was submitted in 1934. There is not the slightest hint in the record or in the argument of counsel that the agreement to end the litigation was not made in the utmost good faith. The commission (representing the public and the users of the company's services) and the company were the necessary parties to that litigation. The expenses had been enormous. More were in sight, together with uncertainty and delay, if the company's grievances were carried to the Supreme Court of the United States. * * *

We do not think the city's non-participation in the settlement of the litigation vitiated the order made pursuant thereto; for, as stated, its interests were represented by the commission and attorney general." (Record Proc. St. Sup. Ct. pp. 10 to 18 incl.).

The pleadings, the orders, memoranda and judgment of the District Court, and the record respecting the proceedings in the State Supreme Court, in this cause, demonstrate that the petitioners therein seasonably presented a Federal question for decision to the highest court of the state having jurisdiction, that its decision of the Federal question was necessary to the determination of the cause and that it was actually decided, and that the final judgment of said Supreme Court, as rendered, could not have been given without deciding it. (Rec. pp. 1 to 35 incl., 78 to 120 incl., pleadings, 38 to 44 incl., 51 to 77 incl., 129 to 141 incl.,

Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.).

This Honorable Court *in re Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood,* 50 L. Ed. 596, 604; 200 U. S. 561, 580, 581, respecting the question of whether or not a Federal right set up had been presented for decision and had been decided in said cause, said:

> "Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of general or local law, then the claim of Federal right would become immaterial and we would not have re-examined the judgment. But the decision was otherwise, and was, in law a denial of the claim of a Federal right."

The petitioners respectfully submit that the record demonstrates that the said State Supreme Court, in this cause, has decided a Federal question of substance, seasonably presented for decision, not theretofore determined by the Supreme Court of the United States, or has decided it in a way not in accord with the applicable decisions of this court and adversely to the claims of the petitioners and in a manner so as to deny the Federal right thereby claimed by the petitioners as patrons of the regulated utility, on their own behalf and on behalf of others similarly situated,

and so as to deprive them of their property without due process of law, in violation of Section I of the Fourteenth Amendment to the Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The Public and Users of the Services of the Regulated Public Utility, in the matter of the Prescription of Rates, have a Federal Constitutional right to be protected against exhorbitant or excessive rates on a parity with the right of the Regulated Public Utility to be protected against inadequate rates, by virtue of the Fourteenth Amendment to the Federal Constitution.

The right of the public and patrons of the regulated public utility to reasonable rates for public utility service and to be protected against excessive charges therefor, is equivalent to that of the regulated utility to compensatory rates and to protection against inadequate rates, since both are secured by Section I of the Fourteenth Amendment to the Federal Constitution.

The public and the users of public utility service in the matter of the prescription of rates, by order of a state rate making commission such as the Railroad and Warehouse Commission of the State of Minnesota, possess a right secured to them by said amendment to the Federal Constitution to insist upon the Commission's compliance with the minimal requirements of due process provided to be afforded by said constitutional amendment as the same has been construed and applied in the decisions of the United States Supreme Court.

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Ohio Bell Teleph. Co. v. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302 to 305 incl;
Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434; 227 U. S. 88, 91;
St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;
Morgan v. United States, 80 L. Ed. 1288, 1294, 1295; 298 U. S. 468, 480, 481;
Smith v. Ames, 42 L. Ed. 819, 842, 847, 848, 849; 169 U. S. 466, 527, 528, 540, 541, 543, 544, 545, 546, 547.

This right of the public and the users of public utility service is substantial. The order here assailed was made without notice, hearing, evidence or any supporting record capable of judicial review for a determination upon the reasonableness of the rates thereby purported to be prescribed, and thus the same was made and entered in disregard of the minimal requirements of such due process provisions and in denial and violation of the right secured to the petitioners as such patrons of the regulated utility and others similarly situated.

"Counsel for the city lays some stress upon Michel v. Illinois Bell Teleph. Co. (1922) 226 Ill. App. 50, 53. But the gist of that case, so far as this question is concerned, may well be stated in the following excerpt from the opinion: 'This is not a case in which the court was called upon to fix a rate, or to determine what was a reasonable rate. The only purpose of the bill was to restrain, by injunction, an alleged unauthorized rate from being put into force and effect.'
* * *

"Of course there are many legal rights the subscriber may enforce in the courts. He must not be unjustly discriminated against, and he may even chal-

> lenge an order of the Commission made in excess of its powers or void for other reasons, and he may, as in the Michel case, supra, enjoin the utility from demanding an unauthorized rate."
>
> City of Birmingham v. So. Bell Tel. & Tel. Co. et al. 176 So. 301, 306, 307.

The said State Supreme Court, in this cause, in determining the Federal question presented by these petitioners for its decision, decided the same adversely to the claims of these petitioners and in denial of their asserted right to insist upon the Commission's compliance with such minimal requirements of said due process provisions as a condition precedent to the making and entering of the assailed order. The said State Supreme Court, in thus determining such Federal question and denying said right asserted and presented for determination by the petitioners, construed the State Statute, hereinabove quoted, Sec. 5291, as permitting the said Commission to alter and increase established rates, without any supporting evidence or record capable of judicial review respecting the reasonableness of the rates thus prescribed as a substitute for the established rates, and to substitute for that required as the minimal by said due process provisions, undisclosed and unrecorded information, the stipulation of the Commission and the Company to be regulated by the new schedule and matters of convenience and expediency, and desire to be rid of harassing delay. (Rec. Proc. St. Sup. Ct. pp. 16, 17, 18).

The statute, as thus construed, is palpably unconstitutional since it manifestly does not, as so construed, provide such due process to the public or users of the public utility service who must pay the rates to be prescribed.

The decision and final judgment of the said State Supreme Court, in this cause, amount to a reversal of the said State Supreme Court's former decision upon the same subject. The said State Supreme Court, in its said decision of February 24, 1939 involving the order of said Commission dated March 31, 1936 *State v. Tri-State Telephone and Telegraph Co.,* 284 N. W. 294, 300, 301, 303, in construing said State Statutes, announced the following rules:

> "Reduced to its simplest terms, the purpose of a judicial inquiry into an administrative proceeding is to determine whether the substantial rights of the parties are invaded. Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176; Los Angeles G. & E. Corp. v. Railroad Commission, 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180; Dayton P. & L. Co. vs. Public Utilities Commission, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267."
>
> "The Commission's obligation to make findings in rate proceedings is doubly apparent. To avoid the charge of unlawful delegation of authority to fix rates, the legislature must condition its exercise by the Commission, and adherence to the statutory standards must appear in the record of the Commission's act. Minneapolis & St. P. S. R. Co. vs. Birchwood, 186 Minn. 563, 244 N. W. 57; Wichita R. & L. Co. vs. Public Utilities Commission, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; Mahler v. Eby, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549; St. Louis & O'F. R. Co. v. United States, 279 U. S. 461, 49 S. Ct. 384, 73 L. Ed. 798; United States v. Chicago, M. St. P. & P. R. Co. 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947. Due process demands that rates be fixed only after a hearing at-

tended by at least the rudiments of fair play. The Commission is in consequence required to base its decision upon the evidence and arguments disclosed at the hearing; its order must be supported by findings of fact which are in turn sustained by the evidence. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431; West Ohio Gas Co. vs. Public Utilities Commission, 294 U. S. 63, 55 S. Ct. 316, 79 L. Ed. 761; Acker vs. United States, 298 U. S. 426, 56 S. Ct. 824, 80 L. Ed. 1257; Ohio Bell T. Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319."

"Recitals in the order of submission to the statutory rules of procedure and decision are inconclusive; compliance with the legislative standard must be evident from the findings of the Commission. Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 30 S. Ct. 417, 54 L. Ed. 608; Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. Likewise in the case of due process the single finding that existing rates are unreasonable is a conclusion and insufficient unless supported by findings of fact more particularly stated which demonstrate the grounds upon which the conclusion is based so that the court may determine whether the order proceeds from a conscientious consideration of the evidence or is arbitrary. Western Buse T. Co. v. Northwestern Bell T. Co., 188 Minn. 524, 248 N. W. 220; United States v. Chicago, M. St. P. & P. R. Co., 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; Ohio Bell T. Co. vs. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093." * * *

"The zone of propriety between the extremes of mere conclusion and undue particularity has never been accurately defined. It has been said that all of

the essential facts upon which the order is based must be found. Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 55 S. Ct. 748, 79 L. Ed. 1382; Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. On the other hand, the Commission is not obligated to display the weight given by it to any part of the evidence or to disclose the mental operations by which it reached its result. Baltimore & O. Ry. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209. A candid statement of the reasons and processes by which its findings are reached would be of assistance to the reviewing court, yet the Commission is under no compulsion to expose its methods. Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319. A bare finding of fair value without findings of historical cost and reproduction cost, accrued depreciation, and historical or reproduction cost less depreciation, will not suffice. Each of these items must be specifically found; a figure arrived at by offsets and comparisons without disclosing the sums compared or offset is not in accord with due process. The Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A., N. S. 1151, Ann. Cas. 1916 A, 18; West v. Chesapeake & P. T. Co., 295 U. S. 662, 55 S. Ct. 894, 79 L. Ed. 1640; Petersburg Gas Co. v. Petersburg, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542." * * *

"The judicial power authorizes courts to inquire into the legal sufficiency of the evidence in support of administrative findings and to declare void an order where the findings are without basis in the evidence, or are based upon evidence inadequate as a matter of law. Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 30 S. Ct. 417, 54 L. Ed. 608; Norfolk & W. Ry. Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745; Ohio Utilities Co. v. Public Utilities Commission, 267 U. S.

359, 45 S. Ct. 259, 69 L. Ed. 656; Banton v. Belt Line Ry. Corp., 268 U. S. 413, 45 S. Ct. 534, 69 L. Ed. 1020."

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas et al., 67 L. Ed. 124, 130, 260 U. S. 48, 59, 43 S. Ct. 51; Panama Refining Co. v. Ryan, 293 U. S. 389, 430-433; 79 L. Ed. 446, 464, 465, 466.

The said State Supreme Court, in its previous decisions, held that the jurisdiction of the Commission can be invoked only by compliance with statutory methods therefor, and that it is a mere administrative commission and whatever may be its powers, they are surely circumscribed by the laws of the state, and the public policy of the state is manifested by its laws.

State v. Great Northern R. Co., 130 Minn. 57, 61, 62; Dayton Rural Telephone Co. et al. v. N. W. Bell Telephone Co., 188 Minn. 547, 551.

Said State Supreme Court, in this cause, by its reference in its decision, apparently treated as significant its conclusion that the Commission, the Companies, and the Attorney General has acted in good faith. The denial of due process in this matter does not depend upon bad faith on the part of the Commission or that of the other parties to the agreement. The Commission, the Companies and the Attorney General are presumed to have been cognizant of the limitations of law, upon the authority of the Commission, to make and file a rate order.

Judd v. City of St. Cloud, 198 Minn. 590, 611.

The said order of the Railroad and Warehouse Commission of the State of Minnesota, dated May 2, 1939, the said final judgment of the State Supreme Court, in this cause, and said Statute, Sec. 5291, as construed by said State Supreme Court, in this cause, severally conflict with the due process provisions of Section I of the Fourteenth Amendment to the Federal Constitution and deny due process of law to these petitioners as such patrons of the regulated utility and others similarly situated, secured to them by said amendment, and result in the deprivation of property of said petitioners as such patrons of said utility and others similarly situated, without due process of law, in violation of said amendment to said Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., 29, 30).

The record demonstrates the verity of the allegations of the complaint, incorporated therein as one of the grounds for the injunctive relief thereby sought, that the petitioners as such subscribers and all others similarly situated have no plain, speedy or other adequate remedy at law in such regard. This is manifestly the case and requires no further comment.

(Rec. pp 1 to 33 incl. Complaint; pp 14 to 27 incl. order; pp 28 to 33 incl. order; pp 11 and 12)

The petitioners respectfully submit that the Writ of Certiorari prayed for should be issued so that the said final judgment of said State Supreme Court, in this cause, may be reviewed and reversed by the Supreme Court of the United States and the errors herein cited and complained of be corrected, such involving matters of paramount importance to the public.

JOSEPH C. LENIHAN, JOSEPH P. KILROY and CITY OF SAINT PAUL, a municipal corporation,
Petitioners.

DAVID J. ERICKSON

ARTHUR LeSUEUR

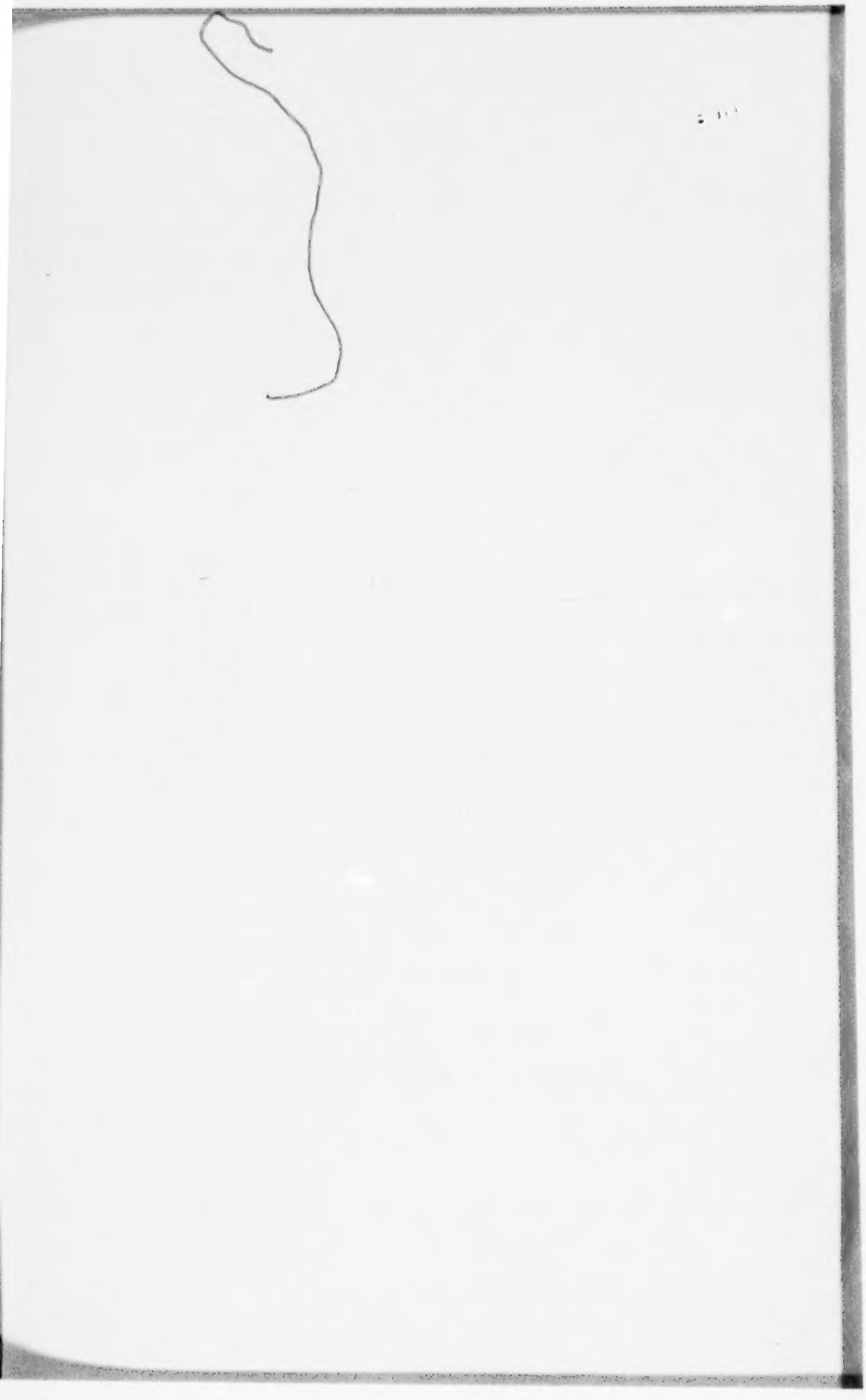
HARRY W. OEHLER
Corporation Counsel, City of Saint Paul.

LOUIS P. SHEAHAN
Ass't Corporation Counsel, City of Saint Paul.
Their Attorneys,
City Hall and Court House Bldg.,
Saint Paul, Minnesota.

JAMES F. LYNCH

ANDREW R. BRATTER
County Attorney and Assistant County Attorney respectively, of the County of Ramsey, State of Minnesota.

Of Counsel.
City Hall and Court House Bldg.,
Saint Paul, Minnesota.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1940
No. 553

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,
and
CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD and WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITIONER'S REPLY BRIEF IN RESPONSE TO THE SEVERAL BRIEFS OF THE RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI.

DAVID J. ERICKSON,
ARTHUR LeSEUER,
HARRY W. OEHLER,
Corporation Counsel, City of St. Paul.
LOUIS P. SHEAHAN,
Ass't Corporation Counsel,
City of St. Paul,
Attorneys for Petitioners,
City Hall and Court House Bldg.,
St. Paul, Minnesota.

JAMES F. LYNCH,
ANDREW R. BRATTER,
County Attorney and Assistant County Attorney respectively of the County of Ramsey, State of Minnesota,
Of Counsel,
City Hall and Court House Bldg.,
St. Paul, Minnesota.

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IN THE

Supreme Court of the United States

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This Reply Brief is respectfully submitted in response to the several Briefs of the Respondents in opposition to the Petition, served and filed herein.

The petitioners shall not be deemed by this Reply Brief to relinquish any position asserted in their Petition and Supporting Brief filed with the Record herein, November 6, 1940.

The Federal Question Presented and Determined Adversely to the Claims of the Petitioners, in This Cause, Was Broad Enough to Cover the Entire Case and Its Decision Controlled the Determination of This Cause by the State Supreme Court.

The Record embracing the pleadings, orders, memoranda and Judgment of the District Court and the proceedings in the State Supreme Court, in this cause, demonstrates that the petitioners therein seasonably presented a Federal question of substance for decision to the Highest Court of the State having jurisdiction, that the decision of said Federal question was necessary to the determination of this cause, that said Federal question was actually decided by the State Supreme Court, in this cause, adversely to the claims of the petitioners, that the Final Judgment of the State Supreme Court, as rendered in this cause, could not have been given without deciding said Federal question, and that special and important reasons exist for the issuance of the writ sought, and the review and reversal of the Final Judgment of the State Supreme Court in this cause. (Rec. pp. 1 to 35 incl., 78 to 120 incl., pleadings, 38 to 44 incl., 51 to 77 incl., 129 to 141 incl., Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.)

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 67, 69, 73 L. Ed. 184, 187, 188, 49 S. Ct. 61, 62 A. L. R. 785.

Chesebro v. Los Angeles County Flood Control Dist. et al., 306 U. S. 459, 83 L. Ed. 921, 925.

The Federal question thus presented and determined adversely to the claims of the petitioners was broad enough

to cover the entire case and its decision controlled the determination of this cause by the State Supreme Court.

The petitioners by their complaint, in the District Court, seeking the adjudication of the assailed order as void and unenforceable and a permanent injunction restraining its enforcement, as respects the City of St. Paul Metropolitan Area, alleged as the basis for such relief, that the assailed order was made without notice, hearing, evidence, essential findings of fact or a Record of the Commission's act in the premises upon which a judicial review of the said order might be afforded, and that by reason of such deficiencies the said order did not conform to the due process clause of the Federal constitution.

The District Court in its Memorandum (Rec. p. 61) made the following pertinent statement:

> "(c) The complaint alleges that the order was made without notice or a hearing or the receiving of evidence. The court is of the opinion that this allegation states a cause of action grounded upon a denial of the minimum constitutional requirements essential to due process and upon an absence of procedural steps mandatory under the statutes for a valid and binding order."

The Record of the proceedings in the State Supreme Court, in this cause, demonstrates that the decision of the State Supreme Court was based upon the determination of said Federal question.

> "The theory of the plaintiffs and the trial court as set forth in the learned memoranda of 28 pages accompanying the order overruling defendants' demurrers to the complaint and the order for judgment on the pleadings, is that the order of May 2, 1939, is void because there was no notice of hearing, no testimony

taken, and no findings of fact contained therein sufficient in law to sustain it."

* * * "But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony and the claimed deficiency as to findings, it is nevertheless valid." (Rec. Proc. St. Sup. Ct. P. 12, f. 3; p. 16, f. 3.)

The State Supreme Court in its decision also said:

"Plaintiffs contend that sec. 5298 of the code requires the commission to 'give all interested parties a chance to furnish evidence and be heard.' But that is when the commission deems it needful to have a valuation of all the property invested in the utility, as was done prior to the order of March 31, 1936. And, of course, then sec. 5307 applies." (Rec. Proc. St. Sup. Ct. pp. 17, 18.)

The State Supreme Court in its decision further said:

"In the case where a telephone company presents a proposal to increase or decrease or change its rates, it, of course, consents thereto, so that it cannot thereafter raise any claim that the rate is confiscatory. The commission in determining whether the proposed new schedule of rates is just and reasonable need not necessarily have a valuation of the company's property and a tedious and expensive litigation. It may already have knowledge of the situation. No statute is pointed to which prescribes that there must be notice given of hearings and testimony taken if the commission has all the necessary information for determination whether the rates proposed to supersede those in force are just and reasonable." (Rec. proc. St. Sup. Ct. pp. 12, 13.)

The Federal Question, Presented and Decided, in This Cause, Is One of Substance, the Decision and Final Judgment of the State Supreme Court Are Not in Accord With the Applicable Decisions of the Supreme Court of the United States and There Exist Special and Important Reasons for the Issuance of the Writ.

The Federal question thus presented by the petitioners and so determined by the State Supreme Court in this cause is manifestly a Federal question of substance.

This Honorable Court has consistently construed and applied the due process provisions of the Fourteenth Amendment to the Federal Constitution so as to require notice, hearing, evidence, findings of fact and a record capable of judicial review, as jurisdictional prerequisites to the order of a State rate making Commission prescribing and promulgating public utility rates.

Ohio Bell Teleph. v. Public Utilities Com., 81 L. Ed. 1093, 1100, 1101; 301 U. S. 292, 303;

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434; 227 U. S. 88, 91;

St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295;

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas, et al., 67 L. Ed. 124, 130; 260 U. S. 48, 59, 43 S. Ct. 51;

Panama Refining Co. v. Ryan, 293 U. S. 389, 430-431; 79 L. Ed. 446, 464, 465, 466.

The decision and the final judgment of the State Supreme Court, in this cause, are not in conformity with the applicable decisions of this Honorable Court.

The said Federal question, as presented, in this cause, is broad enough in scope, to challenge the assailed order as unconstitutional, under the Fourteenth Amendment to the Federal Constitution, and also to challenge as unconstitutional, under said Amendment, the delegation of the legislative power to prescribe rates, to the Commission, unqualified in its exercise by requirements for notice, hearing, evidence, essential findings of fact and a record permitting of judicial review, in the nature of jurisdictional prerequisite to its order prescribing and promulgating rates.

The Decision and Final Judgment of the State Supreme Court, in this cause, hold that the Commission is empowered to exercise the delegated legislative power to prescribe and promulgate rates, for telephone service, unrestricted by requirements for notice, hearings, evidence, findings of fact and the compilation of a record permitting of judicial review and to enter its order altering and increasing rates, conditional only upon the assent of the public utility to be thereby regulated. The authority thus purported to be conferred upon the Commission, is inconsistent with rational justice and comes under the Federal Constitution's condemnation of all arbitrary exercise of power. The effect of the said Decision and Final Judgment would be the conferring upon the Commission a power possessed by no other administrative body, officer or tribunal, under our Government, State or Federal.

There are, palpably, special and important reasons for the issuance of the Writ sought herein.

City Commission v. Bismark Water Supply Co., 181 N. W. 596, 597, 600.

Interstate Commerce Commission v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434.

Wichita Railroad & Light Co. v. Public Utilities Commission of The State of Kansas and Kansas Gas & Electric Company, Intervener, reported in 67 L. Ed. 124, 130.

Petition for Re-argument Manifestly Would Have Been Unavailing.

The said federal question was fully presented by the Record, in the Briefs and upon Oral Argument in the State Supreme Court, in this cause. It is manifest also from the tenor of the Decision and in view of the unanimity of opinion of the participating justices that a petition for reargument would have been unavailing. The fact that such a petition would be unavailing, because of such circumstances and conditions, was alleged in the petition of these petitioners for the order of the State Supreme Court, in this cause, staying all proceedings except the entry of the Final Judgment. The State Supreme Court considered said petition and by the entry of the Order thereupon, impliedly acquiesced in the allegations that a petition for rehearing would be unavailing (Rec. Proc. St. Sup. Ct. 2, pp. 24 to 28 inclu.).

The Brief of the Respondent Company Contains Inacurate Statements Calculated to Mislead this Honorable Court.

The Respondent, The Tri-State Telephone and Telegraph Company, has set forth untrue and misleading statements in its said brief. The said Respondent on page 3 of said Brief sets forth the following statement:

> "The intervenor City of Saint Paul knew of the issuance of the order here in litigation or agreed thereto and accepted the benefits thereof."

This quoted statement manifestly is unsupported by the Record and is in its entirety untrue and calculated to mislead this Honorable Court.

The said Respondent in the second paragraph on page 15 of its Brief sets forth the following statement:

> "The intervenor, City of Saint Paul, acquiesced in this settlement and signed the stipulation for dismissal of the formal litigation, which stipulation recited the issuance of the May 2, 1939, order as being pursuant to the stipulation"

This statement manifestly is unsupported by the Record in any respect, and is entirely untrue.

The stipulation referred to in the quoted statements, contained in said Respondent's Brief, is set forth on pages 84 to 86 inclusive of the Record.

The order, here assailed, emanated from a secret or cloistered conference of the Commission, the Attorney General of the State of Minnesota, the Northwestern Bell Telephone Company and the Respondent, The Tri-State Telephone and Telegraph Company, to the exclusion of the City

of Saint Paul. The City of St. Paul had no notice of the negotiations between said Commission, said Attorney General and said Companies, nor did it participate in any respect in the agreement recited as one of the bases for said order. The agreement between the Commission, the Attorney General and said companies and the entry of the assailed order on May 2, 1939, were accomplished facts long prior to the signing of said stipulation.

The City of Saint Paul was an intervenor in the litigated rate case involving the Commission's order of March 31, 1936, and as such was requested to sign the stipulation. The stipulation related to the litigated rate case, then pending upon stay of proceedings operating until June 5, 1940, in the State Supreme Court, after said Supreme Court's decision dated February 24, 1939, affirming the judgment of the District Court which adjudicated the said order of March 31, 1936, valid, reasonable and not confiscatory. The stipulation was prepared and presented by the Attorney General of the State of Minnesota and had for its operating clause the stipulation of the parties to said cause that upon the expiration of the stay entered therein final judgment might be entered pursuant to the opinion of the court and its mandate issued to the District Court.

The stipulation was so presented approximately two weeks after the entry of the assailed order without any copy of said order or any communication pertinent to the proceedings which attended its entry.

The attention of the court is directed to the Stipulation to Vacate Stay, in said last mentioned cause, executed by the Attorney General of the State of Minnesota and the Attorneys for the Tri-State Telephone and Telegraph Com-

pany and to which neither the City of Saint Paul nor the City of South St. Paul was a party. The final judgment of the Supreme Court in said last mentioned cause was entered not pursuant to the stipulation signed by the City of Saint Paul which contemplated the entry of judgment at the expiration of the existing stay, on June 6, 1939, but upon the later stipulation signed only by the Attorney General of the State of Minnesota and the Attorneys for The Tri-State Telephone and Telegraph Company (Rec. pp. 87, 88; p. 80).

The Respondents in the District Court, in this cause, sought to preclude the City of Saint Paul as intervenor from uniting with the petitioners-plaintiffs in the motion for judgment on the pleadings, upon the basis of the stipulation which had been signed as aforesaid by the counsel for the City of Saint Paul. The court considered the stipulation and the arguments thereon and overruled the objection thus presented by the Attorney General. The State Supreme Court in this cause held that the City of Saint Paul did not participate in the agreement which resulted in the promulgated order of May 2, 1939 (Rec Proc. Sup. Ct. page 18 FF. 1 and 2). The Court said:

> "It does not appear that the City of St. Paul participated in the agreement which resulted in the promulgation of the order of May 2, 1939. But the Commission represented one side—the public and the users of the services—and the Company the other side in the rate fixing controversy * * * We do not think the City's non-participation in the settlement of the litigation vitiated the order made pursuant thereto: for as stated, its interests were represented by the commission and attorney general" (Rec. Proc. St. Sup. Ct. p. 18, ff. 2 and 3).

The State Supreme Court, in This Cause, Determined the Status of the Petitioners as Proper Parties Litigant in Their Respective Positions.

The Supreme Court, in this cause, held that the petitioners-plaintiffs are proper plaintiffs in this cause and that the petitioners-interveners City of Saint Paul is a proper party intervener in this cause. The Court in its decision made the following pertinent statements

The State Supreme Court, in its decision, said:

> "We assume for the purposes of this decision that the suit is properly brought by plaintiffs; that they have no adequate remedy at law and that the statutes do not provide an exclusive remedy."
>
> * * * "We do not overlook the fact that the City of St Paul and City of South St. Paul—users of the Company's services—were permitted to intervene in the original proceeding, and that the City of St. Paul is an intervener in the action." (Rec. Proc. St. Sup. Ct., p. 18, f. 1).

The City of St. Paul has no status in this cause distinguishable from that of any other subscriber to the services of the Tri-State Telephone and Telegraph Company, resident in the City of Saint Paul Metropolitan area detrimentally affected by the assailed order. The City of Saint Paul appears herein merely as such subscriber and not in its capacity as a municipal corporation or in any respect in any governmental capacity. The citations set forth on page 8 of the Brief of the Respondent company as the basis for its assertion therein made that the City may not be heard here claiming lack of due process are not pertitnent to the situation at hand.

D. Hunter, Jr. et al., v. City of Pittsburgh, 52 L. Ed. 151, pp. 159 and 160, 207 U. S. 161, 179, 180.

The authorities cited in the Respondent Briefs from our examination of the same, necessarily limited because of lack of time, do not appear to support in any instance, the claims apparently made on behalf of the Respondents and no good purpose could now be served in an attempt to further discuss the same.

Respectfully submitted,

JOSEPH C. LENIHAN, JOSEPH P. KILROY and CITY OF SAINT PAUL, a municipal corporation,
Petitioners.

By DAVID J. ERICKSON
ARTHUR LeSUEUR
HARRY W. OEHLER
Corporation Counsel, City of Saint Paul.
LOUIS P. SHEAHAN
Ass't Corporation Counsel, City of Saint Paul.
Their Attorneys.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

JAMES F. LYNCH
ANDREW R. BRATTER
County Attorney and Assistant
County Attorney, respectively,
of the County of Ramsey, State
of Minnesota.

of Counsel.

City Hall and Court House Bldg.,
St. Paul, Minnesota.

SUPREME COURT OF THE UNITED STATES

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No. 553

JOSEPH C. LENIHAN, ET AL., IN THEIR OWN BEHALF AS SUBSCRIBERS AND USERS OF THE SERVICE OF THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, ETC., ET AL.,

Petitioners,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION OF JOSEPH C. LENIHAN AND JOSEPH P. KILROY FOR A REHEARING.

DAVID J. ERICKSON,
ARTHUR LEGHEUSE,
Counsel for Petitioners.

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JOSEPH C. LENIHAN AND JOSEPH P. KILROY, IN THEIR OWN BEHALF AS SUBSCRIBERS AND USERS OF THE SERVICES OF THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, AND ON BEHALF OF ALL PERSONS, CORPORATIONS AND ASSOCIATIONS WITHIN THE METROPOLITAN AREA OF ST. PAUL, MINNESOTA, WHO ARE SIMILARLY SITUATED AND AS MAY CARE TO JOIN IN THIS ACTION,

Petitioners,

AND

CITY OF ST. PAUL, A MUNICIPAL CORPORATION,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

AND

CHARLES MUNN, HJALMER PETERSON AND FRANK W. MATSON, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD AND WAREHOUSE COMMISSION, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MINNESOTA,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

Come now the above named petitioners and present this their petition for rehearing of their petition for writ of certiorari, and in support thereof respectfully show:

This case was presented to this Court on petition for certiorari to review a decision of the Supreme Court of Minnesota reversing a judgment of the State District Court of Ramsey County, Minnesota, dated December 15, 1939, whereby said District Court duly adjudged and decreed that a rate order of the Railroad and Warehouse Commission of said State, dated May 2, 1939, was void and unenforceable insofar as it purported to authorize and increase in the charges for telephone service in the City of St. Paul exchange area over the charges authorized in an order of the Commission promulgated March 31, 1936, and also permanently enjoining the respondents from enforcing said May 2, 1939, telephone rate order in said St. Paul metropolitan exchange area insofar as it purported to authorize charges for telephone service in excess of those authorized by said order of March 31, 1936 (R. 142-144). The said Supreme Court by its opinion and final judgment intended to make effective said order of the Railroad and Warehouse Commission of Minnesota, dated May 2, 1939, notwithstanding the fact that said order was made without notice, hearing, evidence and findings of fact based upon evidence (R., Proc. St. Sup. ct. pp. 1 to 29; pp. 29, 30; p. 16 f. 3).

On December 16, 1940, this Court entered the following order in this cause:

"The petition for writ of certiorari is denied."

The Federal Question Was Properly Presented—Both Expressly and Under the "Rule of Clear Intendment"—And Was Necessarily Passed Upon by the State Courts.

It is, and has been throughout this proceeding, petitioners' contention that said order was adopted in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. As pointed out in the petition for certiorari (pp. 9-26) the Federal question was

raised in both the District and Supreme Courts in express terms. The opinion of reversal by the Minnesota Supreme Court, 293 N. W. 601, also appears at pp. 1-20, Proc. St. Sup. Ct. and has been analyzed fully at pp. 50-55 of the petition for certiorari and supporting brief.

It is submitted that when the foregoing referred to analysis of the record is considered—and we now press it upon the Court—neither reason nor authority justify the contention of respondents that no Federal question was presented to the State Court nor decided by it. Assuming *arguendo* that the Federal question could have been raised with perhaps more precision, it is suggested that, in the above referred to state of the record, in the State District and Supreme Courts, it does not lie in the mouth of respondents to assert that anybody was in any doubt whatever of the primary contention of these petitioners, viz: that said May 2, 1939, rate order was adopted, in violation of and contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, without notice of hearing, without evidence, and contained no findings of fact based upon evidence.

Applying the "clear intendment" doctrine, this Court has repeatedly sustained its jurisdiction over cases from the State courts wherein the Federal question appeared much less clearly and less insistently than it does in this case. As early as *Bridge Proprietors* v. *Hoboken*, 1 Wall. 116, 143, this Court pointed out that

> "It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflict with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the Act invalid.
>
> "It would be a new rule of pleading and one altogether superfluous to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in

> the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'
>
> "Very few questions have been as often before this court as those which relate to the circumstances under which it will review the decision of the state courts; and the very objection now raised by defendants has more than once been considered and decided" (1 Wall., at p. 142).

And as recently as *People ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67, the Court reaffirmed the doctrine that no particular form of words or phrases is essential; that it is necessary only that the Federal claim and the ground therefor be brought to the attention of the State court with "fair precision", and that "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

This doctrine has had abundant application and statement by this Court, as shown by the authorities listed in the margin.[1]

In *Columbia Water Power Co.* v. *Columbia Electric St. Ry. L. & P. Co.*, 172 U. S. 475, 485, 488, this Court sustained

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[1] *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, 68; *St. Louis, I. M. & S. Ry. Co.* v. *Starbird*, 243 U. S. 592, 598, 599; *Whitney* v. *People*, 274 U. S. 357, 360; *Powell* v. *Supervisors*, 150 U. S. 433, 440; *Sayward* v. *Denny*, 158 U. S. 180, 184; *Wedding* v. *Meyler*, 192 U. S. 573, 581; *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 41, 48; *California Bank* v. *Kennedy*, 167 U. S. 362, 365, 366; *Dewey* v. *Des Moines*, 173 U. S. 193, 199; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 657; *Toledo, St. L. & W. R. Co.* v. *Slavin*, 236 U. S. 454.

jurisdiction, pointing out that the nature of the Federal question plainly appeared from the very theory of the pleadings, and that the decision of the State court necessarily involved decision of that question. Said the court:

> "* * * the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here" (R. 488).

And in *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277, it was pointed out:

> "In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing act."

In the present case it is clear that the effect of the State Supreme Court judgment here in suit is to give effect to the challenged order.

The Challenged Order is Void Because the Jurisdictional Prerequisites of Notice, Hearing, Evidence and Findings Prescribed and Required by the State Statutes and the Due Process Clause of the Fourteenth Amendment of the Federal Constitution Were Ignored.

It cannot be gainsaid that petitioners were entitled to notice, hearing and opportunity to present evidence and findings before the rate fixing commission enacted the challenged order. This right "is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amend-

ment as a minimal requirement." *Ohio Bell Telephone Co.* v. *Pub. Utility Comm.*, 301 U. S. 292, 304, 305. This right is also recognized and protected by the State Statutes (see District Ct. memo, R. 61-63). It is admitted by the respondents and found by both the District and Supreme Courts that this right to notice hearing, evidence and findings was denied. The *order* is void on its face because of fundamental procedural and jurisdictional defects. *Wichita R. & L. Co.* v. *Pub. Util. Comm.*, 260 U. S. 48, 58, 59. It will be noted that the action in the *Wichita* case to enjoin the Kansas Commission from putting the increased rates in force was brought by a *customer*, the same as in the instant case. Section 13 of the Kansas Utility Act contained a provision almost identical with Section 5291 of Mason's Minn. Stats. of 1927. In construing said Section 13, Mr. Chief Justice Taft said:

> "* * * We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.
>
> "This conclusion accords with the construction put upon similar statutes in other states.
>
> "* * * We rest our decision on the principle that an express finding of unreasonableness by the commission was indispensable under the statutes of the state."

The *Wichita* case, *supra*, was reaffirmed in *Mahler* v. *Eby*, 264 U. S. 32, 68 L. Ed. 548, and in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, on "general principles of constitutional government."

"As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the grounds of invalidity asserted by plaintiffs." *B. & O. R. Co.* v. *United States*, 264 U. S. 258, 265, 266.

The omission of notice and hearing "goes to the very foundation of the action", *Morgan* v. *United States et al.*, 304 U. S. 1, 14. The defect is jurisdictional. * * * It goes to the existence of the power on which the proceeding rests", *Mahler* v. *Eby*, 264 U. S. 32, 43, 45, and is "fundamental in its nature", *Northern P. R. Co.* v. *Dept. of Public Works*, 268 U. S. 39, 44. "A finding without evidence is beyond the power of the Commission", *U. S.* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288.

It is important to note that in Minnesota appeals from orders of the Commission under the Telephone Act are governed by Sec. 5308, Mason's Minn. Stats. of 1927, which provides that the appeal "shall be determined upon the pleadings, evidence, and exhibits introduced before the Commission." The court in Minnesota, therefore, considers both the law and the facts upon the record made before the Commission, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed by the Commission in this case were to receive the stamp of regularity. The order could find no validity in anything that was the subject of its recitals since it had no evidence for its support (Rec. Proc. St. Sup. Ct., pp. 5 to 10, incl.) (R. 136, 137, Dist. Ct. Memo). To paraphrase the language of this Court in *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 301 U. S. 292, 303, 304: How was it possible for the appellate court to review the law and the facts and intelligently to say the findings of the Commission were supported by the evidence when the evidence that it approved was unknowable. What the Supreme Court of Minnesota did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.

The Fourteenth Amendment as well as the State Telephone Act, charged the Commission with the duty of hold-

ing a hearing and proceeding in conformity with due process of law before enactment of the challenged order, and petitioners rightly insist upon the discharge of that duty. See *State* v. *Tri-State Tel. & Telgh. Co.*, 204 Minn. 516, 284 N. W. 294, 300, 301, 303. We direct attention to the quotation from this case at pp. 59-61 of our Brief in support of Petition. The Commission should be compelled to discharge its duty and to accord petitioners their fundamental rights. Surely this proposition is not open to dispute. If the Commission is not so compelled, then it will feel free to follow the example thus set in St. Paul with immunity.

Both the District and State Supreme Courts Found That the Injunction Suit was Properly Brought by the Petitioners and That They Had No Adequate Remedy at Law.

The issue here is essentially one of remedy for enforcement of rights admittedly denied. Injunction is the only means by which the Commission may be kept within its jurisdiction and compelled to discharge its duty. The Minnesota Supreme Court in this case said "* * * that the suit is properly brought by plaintiffs; that they have no adequate remedy at law * * *". (Rec. Proc. St. Sup. Ct., p. 10 f. 3.) Injunction is the only means for enforcing petitioners' rights to a hearing before the Commission. Mr. Justice Holmes, speaking for the court in *Waite* v. *Macy*, 246 U. S. 606, 610, recognized that the only effective means for keeping administrative boards within their statutory and constitutional jurisdiction and within lawful bounds was not an administrative remedy, but an equitable remedy. The learned Justice said that, "*We are satisfied that no other remedy, if there is any other, will secure the plaintiffs' rights.*" He further said that, "*the Secretary and the Board*

*must keep within the statute * * *, which goes to their jurisdiction * * *, and we see no reason why the restriction should not be enforced by injunction * * *"* (Italics ours).

In *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 678, 679, 680, which is in point by analogy, Mr. Justice Brandeis, writing for the Court, among other things said:

> "* * * The State Court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

Thus, the State Supreme Court by denying to petitioners the only adequate remedy for enforcement of their right to a hearing before the Commission denied petitioners the right itself.

The said State Supreme Court in its previous decisions, had held that the jurisdiction of the Commission could be invoked only by compliance with the applicable statutory limitations and the fundamental law of the Nation—the Fourteenth Amendment.

State v. *Great Northern R. Co.,* 130 Minn. 57, 61, 62;
Dayton Rural Tel. Co. et al. v. *N. W. Bell Tel. Co.,* 188 Minn. 547, 551;
State v. *Tri-State Tel & Telgh. Co.,* 204 Minn. 516, 284 N. W. 294, 300, 301, 303.

These fundamental requirements clearly go to the jurisdiction and power of the Commission to act at all. The respondents in their answers admit (R. 82, 83) that they

ignored them. Thus, the Commission, in effect, admits that its act was beyond its jurisdiction and void. This order has no such legal validity as is required to form the basis of an appeal. The Attorney General of the State of Minnesota, refused to take an appeal from said order (R. 11, f. 3 & p. 12, f. 1). Under Sec. 5308 of Mason's Minn. Stats. 1927, the appeal there provided for shall be tried in the District Court on the pleadings, evidence and exhibits introduced before the Commission, as hereinabove indicated. There was not a scintilla of evidence introduced before the Commission as a basis for the challenged order. As pointed out by the trial court in its memorandum, "But this is an attack upon the order in its entirety. The complaint alleges facts which show that the Commission disregarded statutory and constitutional essentials to a valid exercise of its administrative authority. That the plaintiffs, and all other subscribers in the St. Paul Metropolitan Exchange Area, will suffer substantial pecuniary damages, will hardly be controverted. (Citations of State Cases) (R. 69, 70 & 71, f. 1).

This Court in *Arizona Grocery Co.* v. *A. T. & S. F. Ry.*, 284 U. S. 370, 76 L. Ed. 348, speaking thru Mr. Justice Roberts says:

> "Where the commission has upon complaint and after hearing declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when the previous order was promulgated, by declaring its own findings as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparations measured by what the commission now holds it should have decided in the earlier proceeding to be a reasonable rate." (p. 299.)

This demonstrates that, under the rulings of this Court, the Utility has a right to abide by the order made until

it is reversed by legal authority, either by the Court on review or by the Commission itself, upon evidence, with findings sustained by evidence that the old order has been or is now unreasonable, and to go through its quasi-legislative performance requires the exercise of due process.

This Court has also long recognized that judgments rendered in these circumstances are void and may be enjoined in the Federal courts. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *A. T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 165; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183, 184. Nor does the fact that an adversely affected party, by such an order, might obtain a review in the Federal courts make any difference. The State itself must allow a judicial review in its own courts. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

There is no admissible distinction between the challenged order and court judgments in this regard. The order operates in the nature of a judgment, and it is difficult to find a basis for the denial of injunctive relief against its enforcement when it is certain such relief would not have been denied against enforcement of a State court judgment rendered under similar circumstances.

The principles upon which the petition for certiorari is requested are of supreme importance. They pertain not only to administrative procedure under the local law, but also to the administrative law of the Nation. This Honorable Court has not hitherto considered those principles in the light of the peculiar facts presented in the instant case.

If it is to be the law that the highest court of a State will not award equitable relief from the enforcement of a quasi-judicial order which is void on its face because procedural due process of law was denied in its enactment, then such a rule should be authoritatively declared by the judgment of this Court.

In conclusion, petitioners call attention to the fact that this is not a case wherein the State Supreme Court has merely applied well settled State authority to the determination of the fundamental jurisdictional issues involved, nor has it been able to call upon authorities from prior decisions in other jurisdictions to support its conclusions. On the contrary, that court has had to spell out its decision without the benefit of a single controlling prior authority. Far from being based upon "sound principle and abundant authority", the decision below is directly in the teeth of "abundant authority" in the prior decisions of this Court and of other courts, as is fully set forth in our petition for certiorari, at pp. 23-29 and 43—and supporting brief pp. 43-62.

For the foregoing reasons, as well as those stated in the petition for certiorari and supporting brief, it is respectfully urged that this Petition for rehearing be granted and that upon such rehearing the order heretofore entered on December 16, 1940, be vacated and a writ of certiorari to the Supreme Court of the State of Minnesota be granted in this cause.

Respectfully submitted,

JOSEPH C. LENIHAN,
JOSEPH P. KILROY,
Petitioners.

By DAVID J. ERICKSON,
ARTHUR LESEUER,
206-8 Hodgson Bldg.,
Minneapolis, Minnesota,
Counsel for Petitioners.

I, David J. Erickson, of Counsel for the above named Petitioners, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

DAVID J. ERICKSON.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 553

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD and WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITION OF CITY OF SAINT PAUL, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

HARRY W. OEHLER,
Corporation Counsel, City of Saint Paul,
LOUIS P. SHEAHAN,
Asst. Corporation Counsel, City of Saint Paul,
Attorneys for Petitioner, City of Saint Paul,
City Hall and Court House Building,
Saint Paul, Minnesota.

JAMES F. LYNCH,
ANDREW R. BRATTER,
County Attorney and Assistant
County Attorney, respectively,
of the County of Ramsey, State
of Minnesota,
Of Counsel.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

No. 553

A

ADDENDUM TO PETITION OF CITY OF SAINT PAUL, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

1. The State Supreme Court has construed the state laws, particularly Section 5291, Mason's Minnesota Statutes, 1927, so as to confer upon the Commission a pure delegation of legislative rate-making power, unfettered in its exercise, by legislative procedural standards. The state laws so construed are palpably in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

2. The petitioner submits that, however state laws may be construed, the same are displaced and superseded by the dominant question of federal due process.

3. The denial of the writ of certiorari sought by the petition in this cause will result in permanence of the decision and final judgment of the State Supreme Court herein, and the establishment of a rule respecting rate orders of the State Commission binding upon the federal courts of the Eighth Circuit, in utter discord with the otherwise uniform and universally applied rule, that there can be no constitutional pure delegation of the legislative power to prescribe public utility rates vested in a state commission unqualified in its exercise by procedural standards in the nature of requirements for notice, hearing, reception of evidence, and the making or findings relative to pertinent rate-making factors.

The decision and final judgment of the State Supreme Court herein, standing unreversed, will enjoin upon the Federal Courts of the Eighth Circuit, as respects the orders of said commission the application of the rule there an-

nounced when occasion for its application may arise. This will create diversity of decision of the several federal judicial circuits, and the subjection of the rate-paying public to the whim and caprice of said Commission and permit it to alter and increase established telephone rates by its order, in the nature of a mere administrative fiat, unattended by notice, hearing, the taking of evidence, or the making of findings, upon evidence, relative to the pertinent rate-making factors of fair value of rate base, operating expenses and revenues of the company to be regulated.

Wichita Railroad & Light Co. v. Public Utilities Comm. of Kansas, et al, 67 L. Ed. 124, 130, 260 U. S. 48, 59, 43 S. Ct. 51;

Panama Refining Co. v. Ryan, 293 U. S. 389, 430, 433, 79 L. Ed. 464, 465, 466;

Ohio Bell Teleph. Co. v. Public Utilities Comm., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302 to 305 incl.

Erie R. Co. v. Tompkins, 82 L. Ed. 1188.

The petitioner reserves for consideration, in addition to the instant petition, the petition for the writ and the briefs in support thereof.

This cause presents a situation manifestly requiring correction and the reversal of the decision and final judgment of the State Supreme Court. The questions presented are of great public importance, and there are special and important reasons for the granting of the writ. The prejudicial effect of the Supreme Court decision and final judgment upon the public interests is not limited to the State of Minnesota but embraces the country at large, and will among other considerations cause a diversity of decision in the several judicial circuits of the United States.

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AUTHORITIES CITED.

IN THE

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OCTOBER TERM, 1940

No. 553

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Respondents.

PETITION OF CITY OF SAINT PAUL, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the above named petitioner, City of Saint Paul, petitioner, and presents this its petition for a rehearing of the petition for a writ of certiorari in this cause.

I.

JURISDICTION.

The petition for a writ of certiorari, in this cause, was filed, in this Honorable Court, on the 6th day of November, 1940, and was denied by the order of this Honorable Court on the 16th day of December, 1940. This petition is filed within less than twenty-five days thereafter, under Rule 33, Revised Rules of the Supreme Court of the United States adopted February 13, 1939, effective February 27, 1939. The said rule 33 reads as follows:

> "A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

The time for the filing of a petition for such a rehearing has been neither shortened nor enlarged by any order of this Honorable Court.

II.

REASONS FOR PETITION FOR REHEARING.

1. The petitioner upon reanalysis of the petition for the writ of certiorari, the accompanying supporting brief and the petitioner's reply brief in response to the several briefs of the respondents opposing the petition for a writ of certiorari, after the denial of said petition, apprehends that such denial might be attributable to unfortunate selection of language or lack of clarity of expression, in the petition for the writ and the supporting briefs by reason whereof the dominant and controlling question of federal procedural due process under the Fourteenth Amendment to the Federal Constitution, upon the determination of which the final judgment of the State Supreme Court in this cause manifestly rested, was obscured.

The record demonstrates that this cause has for its purpose the adjudication as void and unenforcible and the enjoining of the enforcement of a telephone rate order superseding and increasing then established telephone rates applicable to the City of St. Paul Metropolitan Area made and entered by the Railroad and Warehouse Commission of the State of Minnesota, May 2, 1939, unattended by notice, hearing, the taking of evidence or the making of findings of fact pertinent to relevant factors, upon the ground alleged in the complaint that the order so made transgressed the due process clause of the Fourteenth Amendment to the Federal Constitution. The complaint alleged that said order transgressed the due process clause of the Fourteenth Amendment to the Federal Constitution upon the alleged facts that the same prescribed and promul-

gated a schedule of telephone rates applicable to the Metropolitan Area of the City of Saint Paul, chargeable by the respondent The Tri-State Telephone and Telegraph Company, the operating utility in said Area, in each instance appreciably in excess of the then duly established and authorized telephone rates applicable to said Metropolitan Area thereby provided to be superseded that said order was entered by said Commission without the institution of any proceeding, without notice of hearing, without the conduct of any hearing, without the taking of any evidence, without the making of any findings of fact or purported findings of fact relative to the fair value of the company's rate base, its operating expenses or revenues and without any finding or purported finding that any of the established and authorized rates, provided to be superseded and increased by the schedule of rates set forth in the assailed order, was inadequate or unreasonable and without any record of the Commission's action upon which a judicial review might be afforded upon the question of the reasonableness of said order or the rates thereby prescribed and promulgated. The said order is incorporated in the complaint on its face and by its recitals, its support is limited to irrelevant considerations, unrecorded and undisclosed information alleged to have been in the possession of the Commission, the desire for expediency and to be rid of harrassing delay and expense usually attendant upon rate investigations, the willingness of the Company to accept the new schedule thereby prescribed and promulgated and its promise to refrain from further attempts to carry on litigation respecting a separate and distinct rate proceeding then without the control and jurisdiction of the

Commission and then vesting exclusively in the jurisdiction of the State Supreme Court (Rec. pp. 1 to 33 incl.).

3. Neither the District Court nor the State Supreme Court dealt with any question pertaining to the reasonableness of the rates prescribed and promulgated by the assailed order since no such question was presented to either court. There was no evidence adduced before the Commission and thus no such judicial review could have been afforded. The said state courts were concerned only with the question of federal procedural due process, that is whether the said Commission in its procedure, pertaining to the enactment of said order, as distinguished from the reasonableness of the rates thereby prescribed, failed to satisfy the minimal requirements of the Fourteenth Amendment to the Federal Constitution relating to due process (Rec. pp. 1 to 33 incl., 78 to 120 incl., pleadings 38 to 44 incl., 129 to 141 incl., Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.).

4. The Federal Constitution by Article VI as here pertinent provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The due process clause of the Fourteenth Amendment to the Federal Constitution is supreme and paramount to any law of the state and any law of the state or any interpretation of any state law by the Supreme Court of the state in conflict with said due process clause of the Federal Con-

stitution as the same is written or interpreted by this Honorable Court must fail of effect.

5. The pleadings of the parties to this cause affirmatively established the fact that the assailed order was unattended by any notice, hearing, evidence or findings upon evidence. These fatal deficiencies are apparent from the face of the assailed order and its recitals. The Tri-State Telephone and Telegraph Company, in paragraph ten of its answer in the District Court, in this cause, admitted that said assailed order was unsupported by any evidence and denied that any such support was necessary to its validity, and further denied that the Commission was required to have or consider anything more than its said assailed order of May 2, 1939, shows it to have had and considered. The following is said paragraph ten of said Answer (Rec. pp. 28 to 33 incl. Order; 1 to 33 incl., Complaint; 78 to 120 Ans. & Repl.):

> "This defendant admits no formal testimony was taken from sworn witnesses and hence there was no formal examination of witnesses and no transcript of evidence as such. Defendant denies that such were necessary, or that the Commission was required to have or consider anything more than said order of May 2 shows it to have had and considered." (Record pp. 82 and 83).

The said District Court in this cause granted the petitioners-plaintiffs' motion, in which the petitioner-intervener, City of Saint Paul joined, for judgment on the pleadings and, pursuant thereto, the judgment of said District Court was entered and docketed December 15, 1939, adjudging and declaring said assailed order invalid and unenforcible, insofar as the same purports to prescribe rates applicable

to said Metropolitan Area of the City of Saint Paul in excess of the rates prescribed therefor by the prior order of the Commission dated March 31, 1936 (Rec. pp. 125 to 144 incl.).

The Tri-State Telephone and Telegraph Company, defendant-appellant, in this cause, in the State Supreme Court, alone appealed from said District Court judgment. The Railroad and Warehouse Commission of the State of Minnesota and the Attorney General of said State, the other defendants, in this cause, in said District Court, took no appeal from said District Court judgment and, to all intents and purposes, acquiesced therein (Rec. Proc. St. Sup. Ct. 1-20 incl. Rec. 145, 146).

The said appeal of The Tri-State Telephone and Telegraph Company to said State Supreme Court from said judgment of said District Court was heard and said State Supreme Court entered its opinion thereon in said Court on the 5th day of July, 1940, providing for the reversal of said District Court judgment (Record, Proc. St. Sup. Ct. pp. 1 to 22 incl.).

The said State Supreme Court, by its order dated August 19, 1940, stayed all proceedings upon said appeal in said State Supreme Court except the entry of said final judgment (Record, Proc. St. Sup. Ct. pp. 23, 24).

The final judgment of said State Supreme Court reversing said judgment of said District Court was entered and docketed in said State Supreme Court on the 21st day of August, 1940 (Record, Proc. St. Sup. Ct. pp. 29, 39).

6. This action was instituted and prosecuted by the petitioners-plaintiffs and the petitioner-intervener in their own behalf as subscribers and users of the services of the

said public utility company within said Metropolitan Area and on behalf of all persons, corporations and associations within said Metropolitan Area similarly situated. The federal question and the federal right especially set up in the complaint were based upon the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners persisted in the assertion of their right to federal procedural due process and in their challenge of said order as void because of its palpable denial of such federal due process guaranteed to the subscribers of the utility and the public by virtue of the Constitution of the United States. The federal question thus presented went to the very root of this case and dominated every part of it and the same displaced and superseded every principle of general or local law which, but for such federal constitutional grounds, might have been sufficient for the complete determination of this action. The record demonstrates that the determination of the federal question thus presented by the complaint was the basis for the judgment of the District Court and was also the foundation upon which the final judgment of the State Supreme Court rested. The District Court in its memorandum (Rec. p. 61) ruled as follows:

> "The complaint alleges that the order was made without notice or a hearing or the receiving of evidence. The court is of the opinion that this allegation states a cause of action grounded upon a denial of the minimum constitutional requirements essential to due process and upon the absence of procedural steps mandatory under the statutes for a valid and binding order."

The record of the proceedings in the State Supreme Court, in this cause, demonstrates that the decision of the State

Supreme Court was based upon the determination of said federal question. The State Supreme Court said:

> "The theory of the plaintiffs and the trial court as set forth in the learned memoranda of 28 pages accompanying the order over-ruling defendants' demurrers to the complaint and the order for judgment on the pleadings, is that the order of May 2, 1939, is void because there was no notice of hearing, no testimony taken and no findings of fact contained therein sufficient in law to sustain it."
>
> * * * "But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony and the claimed deficiency as to findings, it is nevertheless valid." (Rec. Proc. St. Sup. Ct. p. 12, f. 3; p. 16, f. 3).

The State Supreme Court in its decision also said:

> "Plaintiffs contend that sec. 5298 of the code requires the commission to 'give all interested parties a chance to furnish evidence and be heard.' But that is when the commission deems it needful to have a valuation of all the property invested in the utility, as was done prior to the order of March 31, 1936. And, of course, then sec. 5307 applies." (Rec. Proc. St. Sup. Ct. pp. 17, 18).

The State Supreme Court in its decision further said:

> "In the case where a telephone company presents a proposal to increase or decrease or change its rates, it, of course, consents thereto, so that it cannot thereafter raise any claim that the rate is confiscatory. The commission in determining whether the proposed new schedule of rates is just and reasonable need not necessarily have a valuation of the company's property and a tedious and expensive litigation. It may already have knowledge of the situation. No statute is pointed

to which prescribes that there must be notice given of hearings and testimony taken if the commission has all the necessary information for determination whether the rates proposed to supersede those in force are just and reasonable." (Rec. Proc. St. Sup. Ct. pp. 12, 13).

7. The State Supreme Court in its said decision set forth the substance of the federal question, omitting to label or specifically designate the same as a federal question, and decided the same adversely to the claims of the petitioners. The decision of the federal question so presented was necessary to the determination of the State Supreme Court and the decision and final judgment of the State Supreme Court as made and entered could not have been made and entered without the decision of said federal question. The said federal question was the dominant pivotal, all-encompassing and all-controlling question upon the determination of which the final judgment of the State Supreme Court in this cause depended. The omission of the State Supreme Court to label or specifically designate the federal question so presented and so determined as a federal question manifestly could not detract from its character as a federal question.

Chicago B. & Q. R. Co. vs. Illinois, ex rel. Grimwood, 50 L. Ed. 596, 604.

The assailed order prescribes and promulgates a schedule of telephone rates applicable to said Metropolitan Area the enforcement of which will result in the imposition upon the rate-paying public of an additional burden of approximately three hundred thousand dollars annually over and above that resultant from the enforcement of the previous established and authorized rate schedule sought to be super-

seded and increased thereby (Rec. p. 43, ff. 2, 3 and p. 57, ff. 2, 3).

8. The public and the users of public utility service in the matter of the prescription of rates, by order of a state rate making commission such as the Railroad and Warehouse Commission of the State of Minnesota, possess a right secured to them by said amendment to the Federal Constitution to insist upon the Commission's compliance with the minimal requirements of due process provided to be afforded by said constitutional amendment as the same has been construed and applied in the decisions of the United States Supreme Court. Railroad Com. of Cal. vs. Pac. G. & E. Co., 82 L. Ed. 319, 322, 302 U. S. 388, 392, 393; Ohio Bell Telph. Co. vs. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302 to 305 incl.; Interstate Commerce Com. vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434, 227 U. S. 88, 91; St. Joseph Stock Yards Co. vs. United States, 83 L. Ed. 1033, 1041, 1052, 298 U. S. 38, 73; Morgan vs. United States, 80 L. Ed. 1288, 1294, 1295, 298 U. S. 468, 480, 481; Smith vs. Ames, 42 L. Ed. 819, 842, 847, 848, 849, 169 U. S. 466, 527, 528, 540, 541, 543, 544, 545, 547.

9. The State Supreme Court decision and final judgment impute to the State Commission a pure delegation of the legislative power to prescribe public utility rates unfettered in its exercise by requirements for notice, hearings, the taking of evidence and the making of findings of fact pertinent to essential factors based upon evidence taken and recorded. This Honorable Court has uniformly construed and applied the due process clause of the Fourteenth Amendment to the Federal Constitution so as to forbid such a delegation

of the legislative rate making power to a state commission.

Wichita Railroad & Light Co. vs. Public Utilities Commission of the State of Kansas, et al., 67 L. Ed. 124, 130, 260 U. S. 48, 59, 43 S. Ct. 51;

Panama Refining Co. vs. Ryan, 293 U. S. 389, 430, 433, 79 L. Ed. 446, 464, 465, 466.

(Cases supra.)

Section 5308, Mason's Minnesota Statutes 1927, applicable to telephone rate proceedings conducted by the said State Commission provides:

> "Any party to a proceeding before the commission or the attorney general may make and perfect an appeal from such order as provided in Sections 1971-1972, Revised Laws of 1905, and acts amendatory thereof."
>
> "Upon such appeal being so perfected it may be brought on for trial at any time by either party upon ten days' notice to the other and shall then be tried by the court without the intervention of a jury, and shall be determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it."

This quoted section of the Minnesota statutes has been construed by the State Supreme Court as permitting a subscriber to telephone service to become a party to a rate proceeding before the Commission and to appeal from its order prescribing telephone rates and as conferring upon the attorney general of the state the right to appeal from such an order of the Commission in the interests of the public in cases where he shall deem the rates prescribed to be excessive. The construction of said statute mentioned is contained in State v. Tri-State Telephone Co., 146 Minn. 247, 250. The court said:

> "The right of appeal is purely statutory. The legislature may give or withhold it at its discretion. If it gives a right, it may do so upon such conditions as it deems proper. (Citing cases.) A telephone user, who believes that the rates approved by the Commission are higher than they should be, cannot appeal, unless he was a party to the proceeding in which the rates were sanctioned. If not such a party, his sole remedy is to procure an appeal to be taken by the attorney general."

The Court upon such an appeal is limited for its determination to a review of the pleadings, evidence and exhibits introduced before the Commission. The legislature clearly intended to provide by said statute for a judicial review of the Commission's rate orders upon appeals therefrom by subscribers who were parties to the proceedings or by the attorney general in the interests of the subscribers and the public. This right of judicial review is nullified by the decision and final judgment of the State Supreme Court in this cause. The State Supreme Court in this cause has fixed as the only jurisdictional prerequisite to an order of the state commission altering and increasing established telephone rates the consent of the utility company to be thereby regulated. Federal due process requires that the procedure followed by the Commission shall embrace all the rudiments of a fair trial with opportunity to present evidence and be heard accorded to every litigant, that the Commission in the prescription of public utility rates shall act upon evidence taken and recorded in the proceeding from which its order emanates and that it shall not act arbitrarily or capriciously and that whatever is done in such cases by the Commission shall be so done that satisfactory judicial review may be had of the reasonable-

ness of the order made both as respects the utility and the public.

Chicago, M. & St. P. R. Co. vs. State of Minn., 33 L. Ed. 970, 981, 134 U. S. 418, 458.

9. The previous decisions of this Honorable Court have consistently held that state rate fixing commissions, conditional to affording due process required by the Fourteenth Amendment to the Federal Constitution, must, in the prescription and promulgation of public utility rates, give notice of hearing, act upon evidence relevant to pertinent factors, make findings of fact upon competent evidence respecting fair value of the rate base, operating expenses and revenues of the utility to be thus regulated, and other pertinent factors, and that an order fixing such rates must be based upon competent evidence adequate to sustain the Commission's findings and a record capable of judicial review upon the question of the reasonableness of the rates prescribed.

The assailed order is utterly bereft of any of the minimal requirements of a valid rate order, and upon its face and by its recitals, demonstrates its denial of due process to subscribers and patrons of the utilities with which it purports to deal in the matter of the prescription of rates and charges.

Railroad Com. of Cal. vs. Pacific G. & E. Co., 82 L. Ed. 319, 322, 302 U. S. 388, 392, 393.

Ohio Bell Teleph. Co. vs. Public Utilities Co., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302, 303, 305.

Interstate Commerce Com. vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 277 U. S. 88, 91.

St. Joseph Stock Yards Co. vs. United States, 83 L. Ed. 1033, 1041, 1052, 298 U. S. 38, 73.

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295.

III.

THE CONTROLLING QUESTION.

The controlling question, therefore, is:

Whether the assailed order so entered by the State Commission without the institution of any rate proceeding, without notice of hearing, without the conduct of a hearing, without the reception of evidence, without the making of findings of fact based upon competent evidence relative to the fair value of the company's rate base, its operating expenses or revenues supported only by its said recitals pertaining to the aforesaid irrelevant matters, prescribing and promulgating a schedule of rates appreciably in excess of the then established and authorized rates thereby provided to be superseded, violated the minimal requirements of due process guaranteed to the public and patrons of the regulated utility by Section 1 of the Fourteenth Amendment to the Federal Constitution?

The petitioner deems the assigned question sufficient for the instant purpose but expressly reserves for consideration all of those cited and set forth as "questions presented" on pages 17 to 19 inclusive of the petition for the writ herein. The State Supreme Court in this cause by its decision and final judgment determined this question in the negative adversely to the claims of the petitioners and thereby committed reversible prejudicial error. The said

decision and final judgment of said State Supreme Court are repugnant to the Constitution of the United States and deny to these petitioners as such subscribers of said utility company and to others similarly situated due process of law guaranteed to them by the Fourteenth Amendment to the Federal Constitution.

The petitioners submit that there was presented, in this case, a Federal question, specially set up in the said complaint by the claim that said assailed order violated the due process provisions of the Constitution of the United States; that said Federal question was decided by the opinion and final judgment of the Supreme Court of the State of Minnesota, in this cause, in a way not in accord with the applicable decisions of this Court, and that the Federal question thus presented and determined was substantial in character. (Rec. pp. 1 to 33 incl.). Railroad Com. of Cal. vs. Pacific G. & E. Co., 82 L. Ed. 319, 322, 302 U. S. 388, 392, 393; Ohio Bell Telph. Co. vs. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302 to 305 incl.; Interstate Commerce Com. vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434, 227 U. S. 88, 91; St. Joseph Stock Yards Co. vs. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73; Morgan vs. United States, 80 L. Ed. 1288, 1294, 1295; 298 U. S. 468, 480, 481; Smith vs. Ames, 42 L. Ed. 819, 842, 847, 848, 849; 169 U. S. 466, 527, 528, 540, 541, 543, 544, 545, 547.

The pleadings, the orders, memoranda and judgment of the District Court and the record respecting the proceedings in the State Supreme Court, in this cause, demonstrate that the petitioners therein seasonably presented a Federal question of substance for decision to the highest court of

the state having jurisdiction, that its decision of the federal question was necessary to the determination of the cause and that it was actually decided, and that the final judgment of said Supreme Court, as rendered, could not have been given without deciding it (Rec. pp. 1 to 35 incl., 78 to 120 incl., pleadings, 38 to 44 incl., 51 to 77 incl., 129 to 141 incl., Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.).

The decisive question is federal in character arising under the Federal Constitution and on which the decision of the State Supreme Court is not final. It is for the state courts to determine the adjective as well as the substantive law of the state, however, such courts must, in so doing accord the parties federal due process of law. Whether acting through its judiciary, its legislature or administrative agencies a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Sav. Co. vs. Hill, 281 U. S. 673, 682.

The effect of the State Supreme Court decision and final judgment is to confer upon the Commission a pure delegation of the legislative power to prescribe rates unfettered in its exercise by requirements for notice, hearing, evidence and essential findings and to thus immunize its order increasing established rates from judicial review. If such result were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment to the Federal Constitution would

be obvious and such violation is none the less clear when such result is accomplished by the state judiciary in the course of construing an otherwise valid state statute since the Federal constitutional guarantee of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. Brinkerhoff-Faris Trust & Sav. Co. vs. Hill, supra, p. 680.

IV.

PUBLIC IMPORTANCE.

There are manifestly special and important reasons of a public nature for the issuance of the writ sought and the review and the reversal of the State Supreme Court decision and final judgment in this cause. If said State Supreme Court decision and final judgment are to stand unreviewed and unreversed it will mean that the State Commission shall possess and exercise a power denied by the Federal Constitution to every other officer, administrative body and tribunal under our constitutional form of government and that said Commission shall be endowed, in contravention to the Federal Constitution, with the pure legislative power to prescribe and promulgate rates by mere administrative fiat unsupported or unattended by notice, hearing, the reception of evidence, the making of essential findings, immune in its actions from judicial review. Such authority, however beneficiently exercised in one case could be injuriously exerted in another, is inconsistent with rational justice and comes under the Federal Constitution's condemnation of all arbitrary exercise of power.

Interstate Commerce Commission vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434, 227 U. S. 88, 91.

V.

For the foregoing reasons, the petitioner City of Saint Paul respectfully prays that a rehearing of the petition for a writ of certiorari in this cause be granted; that upon further consideration the order of this Honorable Court denying said petition for a writ of certiorari dated December 16, 1940, be revoked and vacated; that the writ of certiorari issue to the Supreme Court of the State of Minnesota as prayed for in the petition for such writ filed herein as aforesaid on the 6th day of November, 1940, and that this Honorable Court will proceed to review this cause upon certiorari and reverse the final judgment of the State Supreme Court in this cause.

HARRY W. OEHLER,
Corporation Counsel, City of Saint Paul,
LOUIS P. SHEAHAN,
Asst. Corporation Counsel, City of Saint Paul,
Attorneys for Petitioner, City of Saint Paul,
City Hall and Court House Building,
Saint Paul, Minnesota.

JAMES F. LYNCH,
ANDREW R. BRATTER,
County Attorney and Assistant
County Attorney, respectively,
of the County of Ramsey, State
of Minnesota,
Of Counsel.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

I, Harry W. Oehler, Counsel for the above-named petitioner, City of Saint Paul, do hereby certify that the foregoing petition for a rehearing of the petition for a writ of certiorari, in this cause, is presented in good faith and not for delay.

HARRY W. OEHLER,
Attorney for Petitioner, City of Saint Paul.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 558

JOSEPH C. LENIHAN and JOSEPH P. KUNZ, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may elect to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervening-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES BURT, CHAIRMAN PRESIDING and FRANK W. MAYNE, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

TRACY J. PEYCKE,
CLARENCE B. RANDALL,
RALPH A. STONE,
Counsel for Respondents,
The Tri-State Telephone and
Telegraph Company,
310 Market Street,
St. Paul, Minnesota.

C. M. BRAGDEN,
195 Broadway,
New York, N. Y.,
Of Counsel.

Rogers Printing Co., St. Paul, Minn.

SUBJECT INDEX TO BRIEF.

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STATUTES CITED.

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No. 553

IN THE

Supreme Court of the United States

October Term, 1940.

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

I.

REFERENCE TO OFFICIAL REPORT OF THE OPINION BELOW.

The opinion of the Minnesota Supreme Court appears as *Lenihan, et al. v. Tri-State Telephone & Telegraph Co., et al. (City of St. Paul, et al., Interveners)* at 293 N. W. 601. The opinion has been printed for the Court by Petitioners in "Proceedings in Supreme Court of Minnesota" and appears there at pp. 1-20. Our citations are to that record as "Proc. St. Sup. Ct. p. ....."

II.

OBJECTIONS TO THE JURISDICTION.

Respondent respectfully asserts that the petition for the writ herein should be denied for the reason that no federal question was decided adversely to petitioners by the Supreme Court of Minnesota; further that the record herein fails to show that any federal question was presented for decision to the Supreme Court of Minnesota.

If the federal questions which petitioners now seek to have considered by this Court were decided adversely to them by the Supreme Court of Minnesota without being mentioned, it is submitted that the questions thus submitted are not substantial and, if they were decided by the Supreme Court of Minnesota, its decision was in accord with the applicable decisions of this Court.

Respondent further submits that the writ should not issue because the decision of the State Supreme Court rests upon non-federal grounds adequate to support it.

III.

STATEMENT OF THE CASE.

Under Rule 27, Respondent's duty to make a statement of the case is limited to that deemed necessary to correct inaccuracies or omissions in Petitioners' statement. This statement is so drawn as to be somewhat ambiguous. However, the opinion of the State Supreme Court (see Proc. St. Sup. Ct. pp. 2-10) contains the clear statement of the matter involved and we refrain from further comment except to add:

The opinion and judgment of the District Court and of the Supreme Court rested solely upon the pleadings of the plaintiffs and the defendants. Issues had not been joined on the Intervener's pleadings and were not considered (Rec. p. 129, f. 2).

The Intervener, City of St. Paul, knew of the issuance of the order here in litigation, agreed thereto, and accepted the benefits thereof; then later intervened in this action attacking the same (Rec. pp. 79-80, 84-86; Proc. St. Sup. Ct. p. 18).

IV.

ARGUMENT.

Summary of Argument.

1. No federal question was decided by the Supreme Court of Minnesota and the record herein fails to show that any federal question was presented to it for decision.

2. If the effect of the decision of the Supreme Court of Minnesota was to decide a federal question presented to it by petitioners adversely to them, the decision is in accord with applicable decisions of this Court.

3. The decision of the Supreme Court of Minnesota rests upon non-federal grounds sufficient to support it. The decision holds

A. That the order under review was valid as against the claim that it failed to comply with the statutes of Minnesota respecting notice, hearings, findings and other procedural requirements.

B. That the order, made as it was as a part of a settlement of pending litigation between the parties to such litigation, was within the powers of the Railroad and Warehouse Commission and the Attorney General and was valid.

1.

No Federal Question Was Decided by the Supreme Court of Minnesota and the Record Herein Fails to Show that Any Federal Question Was Presented to It For Decision.

Petitioners do not contend that the Supreme Court of Minnesota in terms considered or decided any federal question (Petition and Brief, p. 12). The opinion of the State Supreme Court (Proc. St. Sup. Ct. pp. 1-20) shows clearly that the court merely held that the order complied in all respects with the statutory requirements of Minnesota; and, independently of this ground of decision, held that the Commission and the Telephone Company had the right to settle the pending controversy respecting rates by placing in effect the order of May 2, 1939 (Proc. St. Sup. Ct. p. 20). Mason's Minnesota Statutes 1927, Section 134, requires that the Supreme Court of that State file its decision "together with headnotes, briefly stating the points decided." The headnotes appear at pages 1 and 2 of the Proceedings in the Supreme Court of Minnesota.

Inasmuch as the State Court did not in terms pass upon any federal questions, it is necessary to consider whether the effect of the decision was to rule adversely to petitioners upon a federal question which was properly presented to the State Court for decision though not mentioned by it. The record herein wholly fails to disclose that any such question founded upon the Constitution of the United States was presented to the Supreme Court of Minnesota for decision.

Petitioners cite only an allegation of the complaint which it is claimed presented a federal question in the Trial Court. It is not enough, however, that a federal question be presented in the Trial Court. It is essential in order to give this Court jurisdiction that the federal question relied upon be presented to the highest court in the State which has jurisdiction to pass upon it, and that the record show the fact of such presentation.

Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575, 54 S. Ct. 93;

Dorrance v. Pennsylvania, 287 U. S. 660, 77 L. Ed. 570, 53 S. Ct. 222.

The record in this case is wholly silent as to what questions were presented to the Supreme Court of Minnesota except as the decision and the opinion of that Court reflected what was before it for decision. No petition for re-argument was filed suggesting that questions had been presented to and overlooked by the Court. We submit that the record in this case fails to disclose the essential basis for jurisdiction of this Court in that it fails to disclose that a federal question was either presented to, or considered or determined by the Supreme Court of Minnesota.

The only reference in this record to any federal question is in a single clause in the complaint, "That said order, Exhibit B, does not conform to the due process clauses of either the State or Federal Constitutions" (Rec. pp. 9-10). This sentence proceeds to allege that the order fails to contain certain findings which are enumerated as to the property, revenues and expenses involved.

The paragraph is indefinite and ambiguous. The best that can be made of it for Petitioners is a claim that under the due process clause of the Fourteenth Amendment a state commission can not make an order approving a change in a rate schedule of a public utility, the utility agreeing, without findings of the kind enumerated, and that this order lacked such findings. But the following sub-paragraph of the complaint numbered (9) (Rec. p. 11) discloses that the facts which plaintiffs were concerned to have found by the Commission were those required by the statutes of the State and by the Court in the previous rate case. It seems to have been thought that where the state law requires certain findings as a prerequisite to an order, the due process clause protects against an order made without such findings.

It is not necessary to consider whether there is anything in such a notion. It is for the State Court to determine what its laws require. The Supreme Court of Minnesota in this case has determined that this order observed all the statutory requirements of that State. Any federal claim under the due process clause based upon a contrary assumption disappeared with that determination.

If any federal question was presented it was that set out in the language of the complaint above referred to. No other appears in the record. There was no hint in the record of a claim that the *statute,* Section 5291, as distinguished from the order, was void as infringing the federal Constitution. That question can not be considered here unless the record shows that it was raised in the State Court. The record here fails to show that any of those questions were presented to the Supreme Court of Min-

nesota. It can not be asserted that Petitioners are excused from raising this claim in the record because the claim did not become pertinent until the State Supreme Court construed the statute as it did. The construction of the statute was one of the principal issues in the case. Petitioners can not maintain that they were surprised by the decision of the State Supreme Court which construed the statute as Respondent had contended it should be construed. Even if they had been, they must still have raised their federal question by application for rehearing. The record shows that no such application for rehearing was filed (Proc. St. Sup. Ct. p. 26).

McGarrity v. Delaware River Bridge Comm., 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565.

Petitioner, City of St. Paul, in its complaint in intervention presented no federal claim of any kind (Supp. R. pp. 1-19). Respondent asserts the City may not be heard here claiming lack of due process for the power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment.

Risty v. Chicago, R. I. & P. Ry. Co., 270 U. S. 378, 70 L. Ed. 641, 46 S. Ct. 236;

City of Newark v. State of New Jersey, 262 U. S. 192, 67 L. Ed. 943, 43 S. Ct. 539.

Petitioners say in their petition and brief (e. g. p. 22) that they have persisted throughout the litigation in the claim that the order in question is in violation of the due process clause of the federal Constitution, but we find no

reference to the record in support of this contention except generally to the complaint and to the decision of the Supreme Court of Minnesota. In order to give the Petitioners standing to present these federal questions here, the record must show that these same federal questions were presented to the Supreme Court of Minnesota. The record in this case fails to show this. See *Lynch v. N. Y. ex rel. Pierson,* 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16.

2.

If the Effect of the Decision of the Supreme Court of Minnesota Was to Decide a Federal Question Presented to It By Petitioners Adversely to Them, the Decision Is In Accord With Applicable Decisions of This Court.

The broadest federal question which petitioners claim or can claim to have raised in this case may be described as an assertion that the order of May 2, 1939, and the statute which the Minnesota Court has construed as authorizing that order, are repugnant to the Fourteenth Amendment because of a failure to provide for public notice and formal hearing with a record and detailed findings based upon evidence covering property value, revenues, and expenses such as appear in the conventional confiscation case. Such a question, if it had been presented, would be unsubstantial and frivolous.

A telephone company, as in the case of common carriers generally, has in the absence of statute in the first instance the same right as any other seller to establish the charge for its service. *Arizona Grocery Co. v. Atkinson, T. & S.*

F. Ry. Co., 284 U. S. 370, 384, 76 L. Ed. 348, 352, 52 S. Ct. 183; *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557, 564, 63 L. Ed. 772, 777, 39 S. Ct. 375. Likewise it may increase or decrease an existing charge. *Arizona Grocery Co. v. Atkinson, T. & S. F. Ry. Co., supra; Interstate Comm. Comm. v. Chicago, G. W. Ry.*, 209 U. S. 108, 119, 52 L. Ed. 705, 28 S. Ct. 493. Subscribers of a utility at common law had no right to notice or a hearing before rates were fixed in the first instance or thereafter changed. Any such right arises only by virtue of statutory provisions.

In Minnesota a statute limits the right of a telephone company to change its rates and the nature and extent of such limitation have been established by the decision of the State Supreme Court in this case. The limitation simply is that such rates shall not be changed without an order of the Commission sanctioning the change. Section 5291, Mason's Minnesota Statutes 1927. The statute requires no public notice or hearing or any particular findings. The State Court has so construed its own law with finality.

The State was quite free to require that either more or less, or no formality attend a change of rates. It could leave the situation as it was at common law; it could require the public filing of tariffs, as it does; it could, as it does, require approval of its regulatory agency; it could have required other procedures. None of these courses in their normal operation gives rise to any constitutional question.

When the State in the more drastic exercise of its police power seeks to regulate rates against the will of the one regulated, everyone recognizes that this process must proceed in conformity with certain requirements which spring

from the due process clause. We are not concerned here with the boundaries of that field. The cases which are there pertinent have nothing to do with this situation.

Yet it is from these cases alone that Petitioners claim any support. (See Petition and Brief, pp. 25, 28, 44-46, 56, 57.) They must admit that Minnesota could, if it chose, withhold all regulation of rates. The Constitution requires none. They argue in effect, however, that, if Minnesota chooses simply to enact that when a telephone company changes its rates, it shall file them and have them approved by the Commission without other formality, a great constitutional barrier arises in its path. They say it can not do so. They say the only way it can take a step in this direction is to require that there be a public hearing with a full record of evidence covering a valuation of the company's property, an examination of its revenues and expenses of operation, and correspondingly elaborate findings,—in short, all the trappings of a "rate case."

The fallacy of such a contention is too apparent to call for extended discussion. Rate payers have no constitutional right to a hearing before rates are changed. They had no right to a hearing at common law. The State may impose on the utility such procedures as it sees fit by way of filing or the approval of a public agency as a condition to making a rate change effective. But such laws give rise to no constitutional rights in rate payers which do not exist in the absence of such laws. Many regulatory statutes, e. g., the Interstate Commerce Act (49 U. S. C. A., Sec. 6), provide that a carrier may change its rates merely by filing revised tariffs. In the absence of affirmative inter-

ference by the Commission, the new rates are effective without any hearing or order of approval. We have never heard it suggested that such statutes invade any constitutional rights of shippers to be heard.

The answer to all of Petitioners' contentions is that there is no constitutional right on the part of customers to notice or hearing, or any other prerequisites to consent by the agencies of the State to a change of rates or to have any particular form of procedure observed for their benefit. *Wright v. Central Ky. Natural Gas Co.*, 297 U. S. 537, 541, 80 L. Ed. 850, 56 S. Ct. 578; *Midland Realty Co. v. Kansas City P. & L. Co.*, 300 U. S. 109, 81 L. Ed. 540, 57 S. Ct. 345; *Wichita R. & L. Co. v. Publ. Utilities Comm.*, 260 U. S. 48, 56, 67 L. Ed. 124, 129, 43 S. Ct. 51.

Subscribers as such have no vested rights in any rate schedule. *Wright v. Central Ky. Natural Gas Co. supra*, 297 U. S. at p. 542.

Petitioners discuss as an apparently separate question a claim that Section 5291 is unconstitutional as construed because it denies to subscribers a right to judicial review of rate orders. We perceive nothing substantial in this contention.

In the first place, Petitioners have had a judicial review of this rate order. That is what this case is. Every ground upon which they attacked the order was considered and disposed of. If administrative action taken by the State is not of such nature as to be a possible invasion of due process, nothing in the federal Constitution is concerned with whether it is subject to judicial review. The State had the undoubted right to approve these new rates or to permit the Company to make them effective without

approval. Nothing in the Fourteenth Amendment requires that such action, itself within the unquestioned power of the State, be subject to judicial review. *Hibben v. Smith,* 191 U. S. 310, 322, 48 L. Ed. 195, 200, 24 S. Ct. 88.

But Petitioners are deprived of no remedy, judicial or otherwise. They could file a complaint with the Commission against the new rates and set in motion the conventional machinery to have determined their reasonableness. See *City of New York v. New York Tel. Co.,* 115 Misc. 262. Nothing has been made to appear which suggests that the Courts of Minnesota are not open to any person whose rights have been invaded by action of the Railroad and Warehouse Commission. This Court's concern with that question will not begin until a person appears who can exhibit such rights.

3.

The Decision of the Supreme Court of Minnesota Rests Upon Non-Federal Grounds Sufficient to Support It.

This Court will not take jurisdiction to review the judgment of a State Court in those cases where the decision, even though it decided a federal question, also rests upon non-federal grounds which independently of the decision upon the federal question are adequate to support the judgment.

Fox Film Corporation v. Muller, 296 U. S. 207, 210, 80 L. Ed. 158, 159, 56 S. Ct. 183.

In this case the decision of the Minnesota Court rests upon a wholly independent non-federal ground which is

entirely sufficient to support the judgment. As disclosed by the syllabus of the Court in this case, it was held:

> "1. Mason's Minn. St. 1927, sec. 5291, impliedly authorizes the commission to sanction new rates proposed by a telephone company without formal notice of hearings and taking of testimony, if satisfied that the rates are just and reasonable; and, as to users of services, the order of May 2, 1939, appears to contain adequate findings.
>
> 2. But apart from the foregoing, parties to pending rate litigation—the commission, representing the public, and the defendant telephone company—had the right to compose and end the controversy by superseding schedule of rates fixed by order of March 31, 1936, by schedule of rates promulgated by order of May 2, 1939" (Proc. St. Sup. Ct. p. 1-2).

The second of these grounds of decision is independent of any federal question and is entirely adequate support for the judgment. As the Court said:

> "As we view this appeal it can and should be disposed of on the ground that both sides to the pending litigation agree to end the same by superseding the rate schedule of March 31, 1936, by that of May 2, 1939" (Proc. St. Sup. Ct. p. 20).

The reasoning of the Court need not be repeated. It appears at pp. 16-18, Proc. St. Sup. Ct.

The State of Minnesota through its duly constituted agencies, the Railroad and Warehouse Commission and the Attorney General, had been carrying on a controversy over an extended period of time with Respondent Telephone Company concerning telephone rates in the St. Paul Metropolitan Area. This controversy had had various ramifica-

tions before the Commission and in the Courts of Minnesota. The facts with reference to this litigation are set forth in the opinion of the Supreme Court (Proc. St. Sup. Ct. p. 2 et seq.).

The Commission, the Attorney General, and the Company agreed upon a compromise and settlement of the entire matter consisting of the approval and putting into effect of new rates as prescribed in the Order of May 2, 1939, and the agreement by the Company to discontinue its litigation of the previous order, permit judgment to be entered, and make refunds accordingly (Proc. St. Sup. Ct. p. 3).

Intervener, City of St. Paul, acquiesced in this settlement and signed the stipulation for dismissal of the formal litigation, which stipulation recited the issuance of the May 2, 1939 order as being pursuant to the stipulation (Rec. 84, 86; Proc. St. Sup. Ct. p. 18).

The State of Minnesota, like any other litigant, was competent to agree upon the settlement of a controversy to which it was a party. This is true whatever the nature of the litigation and regardless of whether the controversy involved state or federal questions. The procedures to be followed in making such a settlement are exclusively for the State of Minnesota to determine for itself. Whether these procedures have been duly followed in a particular case is a question of State law for ultimate determination by the Supreme Court of Minnesota.

The Supreme Court in this case has determined that, under the laws of Minnesota, it was competent for the Commission and the Attorney General to agree upon and make effective the settlement in question. It has deter-

mined that the statutes of Minnesota have been in all respects observed and that a valid and effective settlement has brought about a termination of the litigation in question.

One of the terms of this settlement provided for the establishment of a new schedule of rates promulgated in the Order of May 2, 1939.

This ground of decision is entirely independent of any federal question which is claimed to be raised by the record before this Court. No claim is to be found anywhere in that record which calls in question the settlement, or the procedures incident thereto upon the ground that it disregards any asserted rights under the federal Constitution. Petitioners in their petition and brief apparently make no effort to call attention to any part of the record where any such claim was ever made.

We submit that this ground of decision furnishes an independent basis, that it is purely a question of State law, the decision of which is for the Courts of Minnesota, and

that it is, therefore, a non-federal ground of decision entirely adequate to support the judgment.

The Writ should be denied.

Respectfully submitted,

TRACY J. PEYCKE,
CLARENCE B. RANDALL,
RALPH A. STONE,
Counsel for Respondent The Tri-State Telephone and Telegraph Company,
310 Market Street,
St. Paul, Minnesota.

C. M. BRACELEN,
195 Broadway,
New York, N. Y.,
Of Counsel.

In the Supreme Court of the United States

October Term, 1940 No. 553.

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action, Petitioners,

and

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vs.

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and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota, Respondents.

BRIEF OF RESPONDENTS CHARLES MUNN, ET AL, IN THEIR OFFICIAL CAPACITIES AS STATE OFFICIALS AND IN THEIR PRIVATE CAPACITY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

J. A. A. BURNQUIST, Attorney General,
ALFRED W. BOWEN, Special Counsel,
Attorneys for Charles Munn, et al, in their official capacities.
GEORGE T. SIMPSON, Special Counsel,
Attorney for Charles Munn, et al, as private individuals,
State Capitol, Saint Paul, Minnesota.

Court Printing Company, 322 So. 4th St., Minneapolis

In the
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BRIEF OF RESPONDENTS CHARLES MUNN, ET AL, IN THEIR OFFICIAL CAPACITY AS STATE OFFICIALS AND IN THEIR PRIVATE CAPACITY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

SUMMARY OF OBJECTIONS TO PETITION AND CLAIM OF JURISDICTION

The petition of the petitioners herein does not set forth grounds upon which the jurisdiction of this Court properly may be invoked. The record fails to disclose that any substantial federal question was properly presented below, and none is presented in the petition to this Court.

Aside from the mere averment in the complaint that they were denied "due process", the petitioners can designate nothing in the record to show that they raised, substantiated, or pressed any federal question below. The opinion of the highest court of the state shows conclusively that no federal question was presented to it or was decided by it.

On the other hand, the record shows just as conclusively, that the individual petitioners brought their suit upon just two theories, both of which were adopted by the petitioner, City of Saint Paul, when it intervened later, namely: that the challenged rate order of the Railroad and Warehouse Commission was void because contrary (1) to procedural statutes of the state, and (2) to the prior telephone rate decision of the state supreme court in the case of **Tri-State Tel. & Tel. Co.**, 204 Minn. 516. The petitioners apparently were so confident of the correctness of their first theory and the effectiveness of the improper appeal in the second, particularly after the favorable decision of the trial court, that at no time did they seriously rely upon or urge their vague claim of "due process". The case was disposed of solely upon these two theories, obviously state questions only. Both were refuted and determined adversely by the state supreme court. The petitioners have made no move to amplify the record, or to correct any claimed error therein.

STATEMENT OF THE CASE

Since the case was determined on the pleadings, without findings of fact, and since the pleadings appear in the record, it is believed unnecessary to correct in detail the petitioners' statement. A concise, accurate statement of the facts is available in the opinion of the supreme court. (Proc. Sup. Ct., pp. 2-4)

It is necessary only to add that the petitioners' conclusion (Brief pp. 51-52) that these respondents, the railroad and warehouse commission of the state of Minnesota, its members individually in their official and in their private capacities, and the attorney general in his official and in his private capacity, "to all intents and purposes, acquiesced" in the erroneous judgment of the trial court because they took no appeal therefrom, is without foundation. The suit was in equity, entire in nature, and all of the parties defendant stood at all times on the same grounds. They were equally affected by the judgment of the trial court and by that of the supreme court which reversed the trial court.

The status of the petitioner city of Saint Paul is accurately described in the opinion of the state supreme court. (Proc. Sup. Ct., p. 18)

ARGUMENT

It is believed unnecessary to detail the objections against the petition or to cite the numerous decisions of this Court on the well-established rules applicable thereto. A mere averment of the denial of "due process" is not sufficient to invoke the jurisdiction of this Court. The question must be real and substantial, not fictitious. It must have essence and effect and not mere form. The petitioners made no effort to substantiate their claim. There was no allegation or specification of any right

claimed to be impaired. They did not rely upon or press their vague claim either in the trial or supreme courts.

On the contrary, as previously stated, the petitioners proceeded exclusively on two theories, involving only state questions, namely: (1) a proper construction of procedural statutes relating to telephone regulation in Minnesota, and (2) the validity of the commission's action with reference to a prior decision of the supreme court of the state.

As to the first point, their claim was substantially: that as subscribers they could invoke all the procedural statutes prescribed by state law in telephone rate controversies wherein the commission conducts an investigation of the companies' properties for the purpose of reducing rates and such investigation is accompanied by the customary adversary hearings and regulatory orders. In support of this claim petitioners cited only decisons involving adversary proceedings between regulatory bodies and utilities, in which the utilities claimed for themselves the benefit of such procedural statutes. All of these authorities were therefore distinguished as inapposite by the state supreme court which also referred to and quoted from a recent decision of the supreme court of Wisconsin on the same point. (Proc. Sup. Ct., pp. 12-16)

The petitioners failed to produce any authority supporting their claim. We have been unable to find any. The relatively few cases involving such claims are uniformly adverse to the contention. Included among these authorities, are two recent decisions of this Court:

Wright v. Central Ky. Nat. Gas Co., 297 U. S. 537.

Midland Realty Co. v. Kansas City P. & L. Co., 300 U. S. 109.

The following decisions are in accord:

St. Paul Book & Stat. Co. v. St. Paul Gas Light Co., 130 Minn. 71, 74, 76

In re: Northwestern Bell Telephone Company, 164 Minn. 279, 282

Phelps v. Logan Natural Gas Company, 101 Ohio St. 144

U. S. Light & Heat Corp. v. Niagara Falls etc., 47 Fed. (2d) 567

Birmingham v. Southern Bell Tel. Co., 234 Ala. 526

Brooklyn Gas Co. v. N. Y., 50 Misc. 450, 100 N. Y. S. 570

The reasoning of these authorities may be summarized briefly as follows:

That patrons and consumers of services rendered by utilities subject to governmental regulation have no vested right to any particular rates. That the consumers are represented by the public officials who draft the regulatory laws and those who administer them. That to permit every consumer to litigate rate matters within the jurisdiction of regulatory bodies would result in endless litigation and impose an intolerable burden on the courts. That effective public regulation would thereby be destroyed.

The other point raised below by the petitioners was that the commission's action was contrary to the mandate of the supreme court's prior decision. (Rec. p. 7, ff. 2, 3). The petitioners now seek to raise that point again before this Court. (Brief p. 35, assgns. Nos. 5 and 6). There is no need to add to what has been said above on this matter.

It is clear that both questions raised below by petitioners were and are state questions. They were so presented and relied upon by the petitioners. They were so treated by the supreme court which determined them adversely to the contentions of petitioners. After the final decision below, the petitioners did nothing to change the record or to inject the federal question.

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673

Notwithstanding that petitioners had been granted an extension of time in which to file a petition for rehearing (Proc. Sup. Ct., p. 22), the petitioners subsequently waived any right to file such a petition (Proc. Sup. Ct., p. 26).

But even if it could be said that a federal issue was raised, it is not in this case a substantial question and could not properly invoke the jurisdiction of this Court. Innumerable decisions of this Court have established that if the decision below is plainly correct, or is not contrary to previous decisions of this Court, or if it is expressly foreclosed by previous decisions of this Court, no substantial federal question is presented for the purpose of reviewing decisions of the highest court of any state. All three of the elements mentioned are found in the case at bar.

(Authorities above cited.)

It is, therefore, respectfully submitted that the decision below is based solely upon questions of state law, a determination of which by the highest court of the state is final; that it is based upon non-federal grounds adequate to support it; that it is eminently correct and in accord with decisions of this Court; that the question sought to be presented herein by the petitioners is wholly frivolous and without substance; and that the petition should be denied for want of a properly presented substantial federal question.

Respectfully submitted,

J. A. A. BURNQUIST,
Attorney General,
ALFRED W. BOWEN,
Special Counsel,
Attorneys for Charles Munn, Hjalmar Petersen and Frank W. Matson as members of the Railroad and Warehouse Commission, The Railroad and Warehouse Commission of the State of Minnesota, and J. A. A. Burnquist, as Attorney General of the State of Minnesota,

GEORGE T. SIMPSON,
Special Counsel,
Attorney for Charles Munn, Hjalmar Petersen, Frank W. Matson and J. A. A. Burnquist, individually.

Dated at Saint Paul, Minnesota,
this 25th day of November, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 553.

JOSEPH C. LENIHAN AND JOSEPH P. KILROY, IN THEIR OWN BEHALF AS SUBSCRIBERS AND USERS OF THE SERVICES OF THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, AND ON BEHALF OF ALL PERSONS, CORPORATIONS AND ASSOCIATIONS WITHIN THE METROPOLITAN AREA OF ST. PAUL, MINNESOTA, WHO ARE SIMILARLY SITUATED AND AS MAY CARE TO JOIN IN THIS ACTION, *Petitioners,*

and

CITY OF ST. PAUL, A MUNICIPAL CORPORATION, *Intervener-Petitioner,*

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

and

CHARLES MUNN, HJALMAR PETERSEN AND FRANK W. MATSON, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD AND WAREHOUSE COMMISSION, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MINNESOTA, *Respondents.*

BRIEF OF INTERVENER, CITY OF MINNEAPOLIS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

R. S. WIGGIN, *City Attorney, and*
JOHN F. BONNER, *Assistant City Attorney,*
Attorneys for Intervener, City of Minneapolis,
Room 333 City Hall, Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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BRIEF OF INTERVENER, CITY OF MINNEAPOLIS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF THE POSITION OF THE INTERVENER, CITY OF MINNEAPOLIS.

In order to clarify the position of the City of Minneapolis, which by formal complaint in intervention, not included in

the record presented to this court, except by reference (R. 121), appeared both in the District Court of Ramsey County and the Supreme Court of the State of Minnesota, we wish to supplement the statement of the petitioners.

The order of the Railroad and Warehouse Commission, which is the subject of the litigation, fixed telephone rates for subscribers in the City of Minneapolis in an amount approximately 12½% lower than those in existence at the time of the making of the order. The reduced rates are set out in the order (R. 32). The Tri-State Company furnishes telephone service in St. Paul, and the Northwestern Bell Telephone Company furnishes similar service in the City of Minneapolis. The reduction in the Minneapolis rates was accepted by the Northwestern Bell Telephone Company and by the Attorney General, representing the subscribers in the City of Minneapolis (R. 31).

The petitioners in this case are users of the telephone exchange and telephone service of the Tri-State Telephone Company within the St. Paul Metropolitan Area (R. 3). No user of telephone service in the City of Minneapolis attacked the order of the Railroad and Warehouse Commission. In the memorandum made a part of the order, the District Court of Ramsey County stated that the factual consequences of the order granting petitioners judgment on the pleadings are limited to the St. Paul area (R. 129).

The intervener, City of Minneapolis, is filing this brief because the assignments of error are broad enough to justify the conclusion that the petitioners are attacking the decision of the Supreme Court of the State of Minnesota in its entirety. They claim that the State Supreme Court erred in determining that the order was valid in so far as it affects the service rendered subscribers in the Minneapolis area by the Northwestern Bell Telephone Company, as well

as the service rendered subscribers in the St. Paul Metropolitan Area by the Tri-State Telephone Company (R. 33-38, Petition for Certiorari).

ARGUMENT.

In so far as the order reduces rates for telephone service furnished by the Northwestern Bell Telephone Company to subscribers in the City of Minneapolis, the decision of the Supreme Court presents no federal question. The rates, as reduced, were accepted by the Northwestern Bell Telephone Company. No user of the telephone service furnished by that company has attempted to attack the order of the Commission.

We submit that the petitioners did not, in the District Court or in the Supreme Court, properly raise a federal question. Their complaint was based on the theory that the statutes of the State of Minnesota required notice of the order, hearing, evidence and findings of fact. These claims were disposed of adversely to petitioners by the decision of the Supreme Court.

A careful reading of the opinion of the State Supreme Court compels the conclusion that its decision was based upon the ground that the Railroad and Warehouse Commission of the State possessed the power under the statutes of the State to make the order, Exhibit B, which was based on a valid agreement by both sides to end the litigation (R. 20, Proceedings in Supreme Court of Minnesota). There is presented, therefore, no grounds for review by this Court.

Mobile, Jackson, etc., R. R. Co. vs. Mississippi, 210 U. S. 187 (204).

The petition for the writ of certiorari for the first time

makes the claim that the statutes, as construed by the Supreme Court of this State, violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States (R. 17 and 37, Petition). This federal question is raised too late to permit a review in this Court, inasmuch as it was not made and passed upon in the Supreme Court.

McGoldrick, Comptroller, vs. Compagne Generale Transatlantique, 309 U. S. 430 (434).

Even if it might be said that a federal question is now presented, this question is not of any substantial merit.

Petitioners' claim that there is a federal question appears to be grounded upon their contention that as subscribers they have vested rights in the continuance of the rates in existence at the time the order of the Commission, Exhibit B, was made. This Court has held that no such vested right exists.

Wright vs. Central Kentucky Natural Gas Co., 297 U. S. 537 (542).

Midland Realty Co. vs. Kansas City P. & L. Co., 300 U. S. 109 (113).

The petition is not based upon the character of reasons which this Court by subdivision 5A of Rule 38 has indicated as special and important grounds for granting writs of certiorari.

Respectfully submitted,

R. S. WIGGIN, *City Attorney, and*
JOHN F. BONNER, *Assistant City Attorney,*
Attorneys for Intervener,
City of Minneapolis,
Room 333 City Hall,
Minneapolis, Minnesota.